

Transatlantic Governance in Food Trade:

Dispute settlement and equivalence
as trade-facilitating tools

Frode Veggeland and Stine Evensen Sørbye



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Introduction¹

Over the years, there has been increased attention, in academic literature as well as in international trade fora, towards trade barriers caused by national regulations and product standards (Vogel 1995; Sykes 1995, 1999; Egan 2001; Josling et al. 2004; Fliess and Kim 2008; Djelic and Sahlin 2012; Van den Bossche and Zdouc 2013; Jupille et al. 2013). One of the core concerns raised is how trade can be facilitated without compromising legitimate objectives such as health protection. This paper addresses this question by analysing two ‘instruments’ available under the World Trade Organization’s (WTO) Agreement on Sanitary and Phytosanitary measures (SPS Agreement), which may be used to solve regulatory conflicts and remove trade restrictions: equivalence² and dispute settlement. The main research questions are: What characterizes the SPS regulation of non-tariff barriers (NTBs) in world food trade? Under what conditions can the WTO’s dispute settlement mechanism (hard governance) and equivalence agreements (soft governance), be effective in solving conflicts and removing trade restrictions while at the same time safeguarding legitimate (health) concerns? The paper focuses on trade relations between the EU and the United States (U.S.). The EU and the U.S. are major players in world (food) trade, both have experience from using equivalence agreements as instruments to facilitate trade, and they appear by far as the most frequent complainants/respondents in WTO disputes (WTO 2015a). The paper is based on public documents, statistics on disputes and NTBs, trade statistics, literature, as well as on interviews and findings from a separate study of EU’s “toolbox of instruments” in trade facilitation (WTO 2002a, 2002b; Veggeland 2006)³. The aim of the paper is

¹ This paper has been prepared as part of the project “Non-tariff barriers, food safety and international food trade”, managed by NUPI (Norwegian Institute of International Affairs). Frode Veggeland (University of Oslo and NILF) has been main responsible for writing and preparing the paper. Stine Evensen Sørbye (NILF) has prepared and systematized data presented in Figures 4-8, Table 2 and parts of Annex 2, and has provided valuable comments to the whole paper as such. The authors would like to thank project leader Arne Melchior at NUPI and Maren E. Bache at NUPI, as well as Martin S. Time at the University of Oslo, for valuable comments to earlier versions of this paper. We also would like to thank the participants at the Final Conference of the project “Non-tariff barriers, food safety and international food trade”, arranged by NUPI in Oslo, Norway 26-27 February 2015 for comments to the paper presentation.

² “Equivalence” and “equivalency” have the same meaning and are used interchangeably in this paper.

³ The interviews for the study presented in Veggeland (2006) were made at a time when equivalence was much debated in the WTO, and furthermore when disputes on SPS issues were high on the agenda. The interviews were made with officials

twofold. First, we investigate empirically international experience with non-tariff barriers to trade (NTBs) in the SPS area (food safety), as well as disputes on SPS measures being brought up in the WTO. Second, we analyse the SPS Agreement's provisions on equivalence and dispute settlement and look at how these two trade-facilitation⁴ tools have been used in conflict-resolution by studying two cases both involving the EU and the U.S.: a) the 'beef hormones' dispute, and b) the veterinary equivalence agreement (VEA). Based on the case studies we analyse the conditions under which the WTO's dispute settlement mechanism and equivalence agreements respectively, can be effective instruments in world trade governance, including their effectiveness in conflict-resolution and trade facilitation. The results from this study are thus highly relevant for the ongoing negotiations on a comprehensive trade agreement (TTIP: Transatlantic Trade and Investment Partnership) between the EU and the U.S., where food trade governance and regulatory issues play a prominent role.

from the European Commission's DG SANCO (Directorate General for Health and Consumers), DG Trade, DG Agriculture and DG Enterprise; officials from the U.S. Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA).

⁴ This paper uses a broad understanding of "trade facilitation", i.e. all measures, tools, instruments etc. that can be used to facilitate trade. This is not to be confused with "trade facilitation" narrowly defined as "...simplification of trade procedures in order to move goods in cross-border trade more efficiently", which became a topic of discussion at the WTO's Singapore Ministerial Conference in December 1996 (referred to as one of the "Singapore issues"), which was moved forward in the WTO's so-called "Bali Package" of 2013, and in that context was strictly linked to GATT Articles V, VIII and X (Staples 2004; WTO 2015a, 2015b, 2015c).

Background: the SPS Agreement and non-tariff barriers to food trade

Non-Tariff Barriers to trade (NTBs) refer to a large number of trade restrictions (other than tariffs) that emanate from domestic measures such as product and production methods requirements, documentation requirements, quantitative restrictions, prohibitions, custom procedures and fees etc. that make importation or exportation of goods and services difficult and/or costly (Fliess and Kim 2008; Van den Bossche and Zdouc 2013). In the context of the WTO, the core question is whether these measures unnecessarily or arbitrarily restrict trade (Jackson 1997: 194). NTBs can be defined broadly (often done by proponent of trade liberalization) with the aim of strengthening the ability of producers to challenge regulatory policies of trading partners (Vogel 1995: 14). However, NTBs can also be defined narrowly (often done by proponents of stricter regulatory standards) with the aim of preserving nation-states' ability to maintain strict regulations and in some cases to impose them on trading partners (*ibid.*). Thus, in bilateral and multilateral trade settings, the debate over NTBs is characterized by the question of how to justify domestic regulatory policies that impede on trade, as well as the question of identifying solutions to how trade can be facilitated without compromising the (legitimate) objectives and concerns that is used to justify NTBs.

Domestic food regulations and standards are not deemed as NTBs per se – the adoption of risk-based regulations and standards is necessary and important to address legitimate health concerns. However, because these measures often have negative effects on cross-border trade, they also appear as an important group of NTBs in world trade (Vogel 1995: 14; Josling et al. 2004: 28-31). GATT (General Agreement on Tariffs and Trade) – the predecessor to the WTO – recognized food regulations and standards as a group of measures that increasingly (and according to many: unjustifiably) impeded on world trade. Thus, a separate agreement (the SPS Agreement) covering these measures, was negotiated during the Uruguay Round of negotiations (1986-94). Similarly, the EU identified NTBs in food and agriculture trade as a serious challenge for reaching the objective of a well-functioning internal market – thus, harmonization and mutual recognition of food regulations and standards became a major part of the EU's Single Market program of the 1980s and 1990s (Armstrong and Bulmer 1998; Vos 1999; Egan 2001; Ugland and Veggeland 2006).

The WTO's SPS Agreement “applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade”

(Article 1). SPS measures are defined as any measures used to protect human, animal and plant life or health.⁵ Measures to ensure food safety is thus at the core of what is covered by the agreement. Basically, the drafting of the SPS Agreement was about setting up trade rules to avoid discriminating and unjustifiable NTBs in food and agriculture trade. The agreement entered into force simultaneously with the establishment of the WTO – on January 1 1995. The SPS Agreement gives the WTO members the “...right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement” (Article 2.1). However, the “...Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence (...)” (Article 2.2). These provisions illustrate the so-called proportionality principle, which in international trade law serves as guidance for states to strike the correct balance between a (trade) restriction imposed by a regulatory measure and the severity of the objective this measure is meant to achieve (Vos 1999; Abott and Snidal 2000; Shaffer and Pollack 2002).

The SPS Agreement thus gives WTO members the right to impose NTBs, but under certain specified conditions. A basic requirement is that the (trade-restricting) measure needs to be based on science. The Agreement also specifies a number of instruments that can be used to avoid and/or remove NTBs: the WTO members may harmonize their regulations on as wide basis as possible by basing their national measures on recognized international standards (Article 3); they can accept the SPS measures of other members as equivalent, even if these measures differ from their own (Article 4); and they can eventually bring a complaint to the WTO’s dispute settlement system with the aim of using legal instruments to “force” another member to remove its trade restricting SPS measure (Article 11).⁶ The main focus of this paper is on the last two of these instruments: equivalence and dispute settlement; the first is about regulatory dialogue, mutual acceptance of differences between regulatory systems, and gradual regulatory convergence (c.f. “soft governance”); the second is about using the powerful dispute settlement mechanism of the WTO to “force” another mem-

⁵ The definition of sanitary and phytosanitary measures is included in Annex A of the SPS Agreement, which among other things operationalize SPS measures as “...all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety”.

⁶ Full texts of SPS provisions on equivalence (Art. 4) and dispute settlement (Art. 11) are included in Annex 1.

ber to change its trade-restrictive (regulatory) measure – or, if the respondent refuses to do this, to achieve mutually-acceptable compensation, or if they even fail to reach such an agreement, to impose retaliatory measures authorized by the WTO (c.f. “hard governance”).

Analytical framework: ‘soft’ vs. ‘hard’ governance in world trade

NTBs are generally caused by differences in national regulations. In this paper, ‘regulation’ generally refers to some sort of public control (through efforts made by state agencies) over valued activities which have been set out to achieve stated public goals, such as health and consumer protection, protecting the environment and increasing the welfare of citizens (Meier 1985; Selznick 1985: 363; Hood 1997; Jordana and Levi-Faur 2004). As policy-makers and regulators have realized that NTBs stand in the way for trade liberalization efforts, they have developed a set of governance tools, which can be used to eliminate NTBs. Equivalence and dispute settlement can be viewed as two types of governance tools used to remove trade barriers caused by regulatory differences (“regulatory governance”). We define the former as a “soft governance” tool and the latter as a “hard governance” tools; c.f. also soft vs. hard regulation and soft vs. hard law (Abott and Snidal 2000; Sisson and Marginson 2001; May 2002; Jacobsson 2004; Mörth 2004; Footer 2008; Lobel 2012; *Shaffer and Pollack 2010, 2012*). *Moreover, in this paper we analyze these tools as part of the transatlantic governance involving food trade relations between the EU and U.S. (Pollack and Shaffer 2001).*

Hard governance involves the use of mandatory rules and agreements (hard law), hierarchical authority and power, and formalized enforcement and compliance mechanisms, including the use of sanctions and retaliatory measures in cases of non-compliance (Abott and Snidal 2000; Shaffer and Pollack 2010). Soft governance involves alternative and less binding means to social control than hard governance (Shaffer 2002; Borrás 2004; Caporaso 2006; Dunoff and Pollack 2012). Examples of soft governance mechanisms are non-binding commitments (soft law), voluntary coordination, training programmes, information exchange and confidence building initiatives between scientists and regulators from different countries. These mechanisms involve voluntariness and are aimed at creating common understanding of rules and objectives and at creating a platform for regulatory cooperation and convergence. Soft governance mechanisms are believed to reduce tensions between regulatory systems and, in the context of NTBs, to remove trade restrictions, i.e. minimizing trade barriers caused by regulatory differences. Equivalence agreements can be deemed as one particular soft governance tool. Determination of *equivalence* means that the involved parties accept that rules are different as long as it is possible to determine that the rules fulfil some commonly stated objective in a satisfactory way (Elvestad and Veggeland 2004,

2005; Veggeland 2006; WTO 2002a). Thus, the concept of equivalence refers to the “likeness” (not “sameness”) of different rules with regard to some predetermined parameter. Equivalence assessments thus imply the judgment of different regulations as equal based on their ability to achieve the same objectives. The achievement of equivalence allows trade to flow freely within the areas covered by an equivalence agreement while at the same time allowing for differences between national regulations to persist. Equivalence assessment may thus be considered as a soft approach to regulation and trade facilitation (at least “soft” when compared to mandatory “hard law”) inasmuch as it allows for a continuation of regulatory differences and that it involves voluntariness and mutual understanding more than the use of hierarchical authority and force.

When applied in a world trade setting, equivalence assessments are normally part of an international agreement (“equivalence agreement”) or they are used on a case-to case basis through individual decisions on the “likeness” of other countries’ individual regulations (“equivalence judgements”) (WTO 2002a; Veggeland 2006). Focus is here on “equivalence agreements”, which are more ambitious attempts at mutually facilitating trade between two or more trading partners (Becker 1999). Table 1 below summarizes the categories of soft and hard governance tools when used to eliminate barriers to trade. Even though ‘soft’ and ‘hard’ governance can be contrasted in this way, the use of these tools will often be more of a matter of degree than of either-or. In practise ‘soft’ and ‘hard’ governance may supplement and complement each other. Moreover, both of these governance tools have limitations as to how effective they are in removing trade restrictions and facilitating trade. The question is *under what conditions* they are most likely to facilitate trade. Normally, soft governance will be used as a supplement to hard governance/hard law. The effectiveness of soft governance moreover relies on economic incentives (there are gains to be made), as well as on social control, peer pressure and naming and shaming. Furthermore, building confidence, faith and trust between regulators is fundamental to the effectiveness of soft governance. According to the logic of soft governance, if there is sufficient trust between different national regulatory systems, conflicts on NTBs will be solved through dialogue and informal consultations – formal sanction-mechanisms may thus become superfluous. This contrasts to hard governance which heavily relies on formal sanction-mechanisms in cases of non-compliance.

*Table 1: Methods to eliminate barriers to trade: soft and hard governance*⁷

Category	Conditions and instruments
HARD GOVERNANCE (full compliance)	Compliance mandatory – hard law Tendency to focus on specific rights and obligations Use of formal compliance mechanisms – need for formal authority and power in enforcement Formal compliance mechanisms through sanctioning options Respect for rules – juridical obligations Options for local deviations prohibited Focus on final result Full counteraction of NTBs
SOFT GOVERNANCE (partial compliance)	Compliance voluntary – soft law Tendency to focus on general principles Judging different regulations as equal based on their ability to achieve the same objectives – regulatory dialogue and need for high degree of mutual credibility and trust Informal compliance mechanisms through open-ended processes, “naming and shaming”, benchmarking and peer group audit, ‘moral-suasion’ Common understanding of rules – political obligations Local deviations accepted Focus on process Partial counteraction of NTBs

Hard governance is assumed to create little room for flexibility and discretion when it comes to compliance. Moreover, it is heavily based on the assumption that actors (including trading nations) act according to the logic of consequences, i.e. they base their actions – implicit or explicit – on a cost-benefit analysis (March and Olsen 1989, 2006). Subsequently, they will act on the basis of fixed preferences and positions in their trade relations. Thus, the effectiveness of hard governance is depending on distribution of power, as well as on institutional constraints that shape action, i.e. formal constraints (established rules), informal constraints (social norms) and enforcement mechanisms (North 1990:3). Thus, the assumption is that trade conflicts and dis-

⁷ Table 1 is inspired by the tables presented in Egan (2001:70) and Sisson and Marginson (2001: 4), but has been supplemented by specifying the method of equivalence assessments as a soft governance tool (Elvestad and Veggeland 2004, 2005; Veggeland 2006).

putes will be solved through the use of power and force and within institutional constraints that are external to the involved actors and that the degree of compliance is depending on how powerful the enforcement mechanisms are. Moreover, according to this perspective, strong nation-states will compromise and comply only when fundamental interests are not overrun (Moravcsik 1998). Following from this, the *assumption is that dispute settlement will not be effective when fundamental interests are at stake; the institutional constraints in international relations are not assumed to be strong enough to force powerful states to comply with international rules and change their positions when these positions are based on basic and important national interests.*

Soft governance on the other side, is to a larger extent based on the logic of appropriateness, which means that "...ambiguity or conflict in rules is typically resolved not by shifting to a logic of consequences and rational calculation, but by trying to clarify the rules, make distinctions, determine what the situation is and what definition 'fits' " (March and Olsen 1989: 161; March and Olsen 2006). Soft governance opens up for more flexibility and leeway when it comes to compliance – often a core element of cooperative regulatory arrangements involving sovereign states (Jacobsson 2004; Nicolaodis and Shaffer 2005; Footer 2008; Abott and Snidal 2000, 2009, 2013). The *assumption is that positions and preferences may be shaped through interactions involving politicians, bureaucrats, regulators, scientists, as well as business, and thus that soft governance to a higher degree allows for participants to convince each other to change positions by letting the "best argument" shape outcomes.* Transgovernmentalism and transnational regulatory governance are terms used for such interactions (Slaughter 2004; Djelic and Sahlin-Andersson 2006, 2012). Conflicts and disputes are assumed to be solved by creating common understanding about the issues at hand through interactive processes. Thus, even though it may be resource-demanding and time-consuming, soft governance is assumed to contribute to stable and effective conflict management – by establishing common understanding of the issues at hand, which may prove difficult within hard governance. The *assumption is that in situations when positions are locked and interests are strong, the use of "soft instruments" may change mind-sets and preferences thus contributing to effective compliance and conflict-resolution.*

The two modes of governance – as presented here – are ideal types. In practice we will find elements of both in international trade relations. However, we will nevertheless, apply this analytical framework as a basis for identifying some core conditions that allow for different Figure2: Food imports 2000-2013 (in mill. U.S. dollar– non-indexed figures)modes of governance to be effective.

World food trade, NTBs and trans-atlantic relations

Figure 1 below shows that from 2000 until 2013, the total value of world food trade increased more than 330 %. In 2013, the value of world food trade was about 8 % of all world commodity trade. The increase in the value of food trade is illustrated in figures 1 and 2.⁸

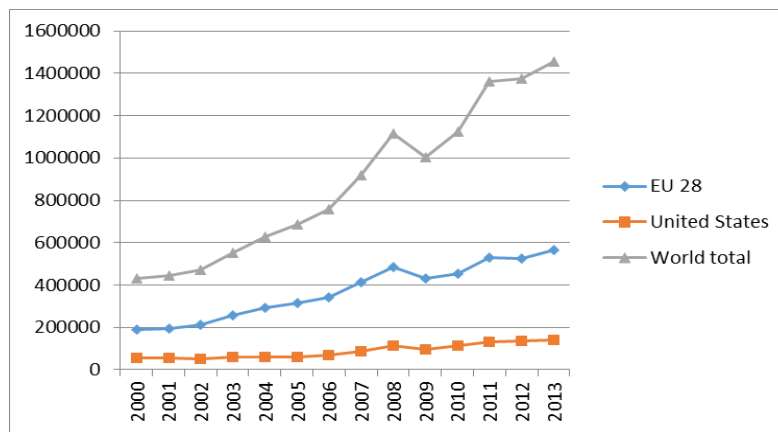


Figure1: Food exports 2000-2013 (in mill. U.S. dollar – non-indexed figures) (Source: WTO’s International trade and market access data base).

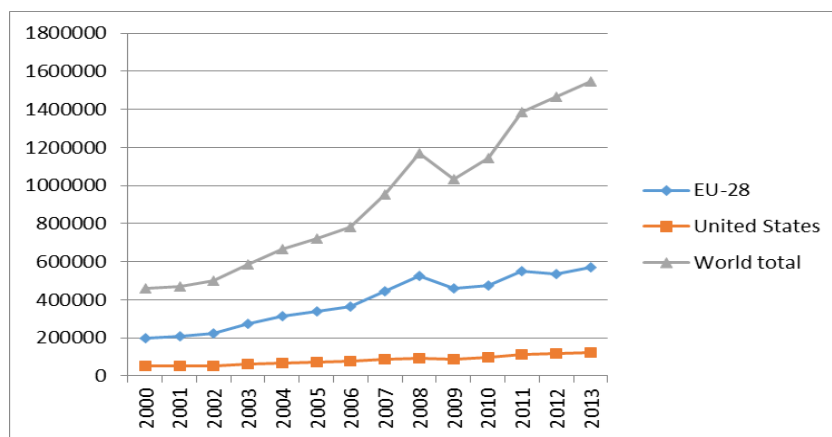


Figure2: Food imports 2000-2013 (in mill. U.S. dollar– non-indexed figures) (Source: WTO’s International trade and market access data base).

⁸ In the WTO trade statistics, “food” is defined as: food and live animals; beverages and tobacco; animal and vegetable oils, fats and waxes; oilseeds and oleaginous fruit (SITC sections 0, 1, 4 and division 22).

Figure 1 shows that the EU-28 has had a stronger increase in its food export value than the U.S. since the 2000 (298% vs. 260%). The EU generally appear as a major player in world trade and had in 2013 a share of almost 40 % of the value of all world food trade (exports and imports).⁹ Figure 2 shows a stronger increase in the EU's food imports than for the U.S. The increase in total food imports 2000-2013 was 283 % for the EU-28 and 239% for the U.S.

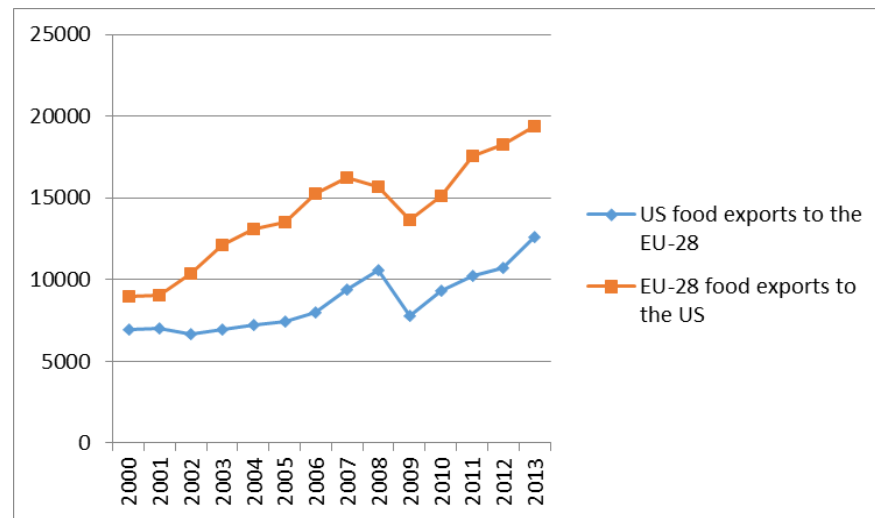


Figure3: Food trade between the EU-28 and the U.S. 2000-2013 (in mill. U.S. dollar– non-indexed figures)

(Source: WTO's International trade and market access data base).

Figure 3 shows the value of food trade between the EU and the U.S. 2000-2013. Food trade amounts to about 5% of all commodity trade between the EU and the U.S. The value of food exports from the EU to the U.S. increased by 215% from 2000 to 2013 – the value of U.S. food exports to the EU increased by only 182%. These figures illustrate both that food trade is an important component of world trade and that the EU and the U.S. are among the world's biggest food exporters as well as food importers. Thus, the roles of the EU and the U.S. in adopting trade-restricting measures affecting imports, as well as their roles in challenging other countries' trade restricting measures, have potentially a big impact on world food trade governance.

In this paper we focus in particular on non-tariff barriers to trade and we moreover analyze mechanisms or tools (dispute settlement and equivalence) that can be used to remove or reduce the negative trade effects of such barriers. As tariffs over the years have been considerably reduced, the significance of other trade barriers – such as NTBs – has

⁹ The value of food exports and imports for EU 28 also include intra-EU trade. The figures nevertheless illustrate the significance of EU countries' involvement in the total of world food trade transactions (more information about the figures is found on WTO's International trade and market access data base).

increased. We focus on a particular group of NTBs: trade-restricting SPS measures. Under the SPS Agreement, the WTO members are required to notify each other, through the WTO Secretariat, of “any new or changed sanitary and phytosanitary requirements which affect trade” (WTO 2015a). Every member has also been required to set up so-called called “Enquiry Points” to respond to requests for information about trade-affecting SPS measures, including how these measures are applied and justified under WTO rules. To illustrate the increasing importance of trade-affecting SPS measures, we have included in Figure 4 the number of SPS measures that the WTO members have notified to the WTO between 1995 and 2012. “Normal measures” are measures that WTO members implement on a routine-basis. “Emergency measures” are measures where member state governments may “act without delay, but must immediately notify other Members, through the WTO Secretariat” (WTO 2015a). This may for example be relevant in cases where there is a major outbreak of a food-borne disease in another member state.

Figure 4 below shows that in the first three years after the SPS Agreement entered into force, there were less than 300 notifications each year. For the last three years there were more than 800 notifications each year. All of these measures are assumed to affect trade. Thus, figure 4 illustrates the increased potential for SPS measures to have a trade-restricting effect on world trade.

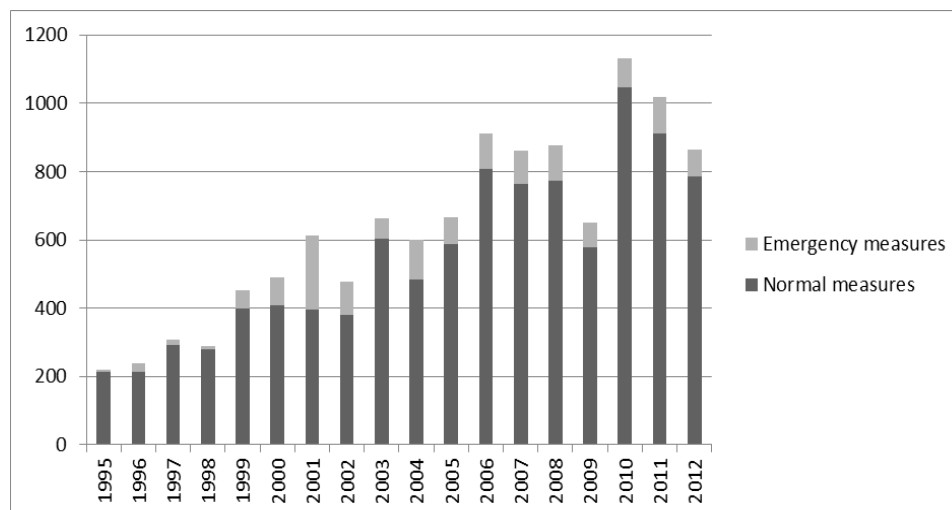


Figure4: Number of SPS notifications to the WTO 1995-2012
(Source: the SPS Committee’s yearly reports on circulated Documents and notifications).

The EU is of great importance when it comes to SPS measures, as a major market for food exporters as well as a major exporter of food to other markets. According to Aisbett and Pearson (2010: 8), the EU accounts for more than 12 % of all SPS notifications between 1996 and 2010, whereas the U.S. accounts for more than 6 %. Moreover, as of November 2014, the EU had 73 ongoing SPS cases on a bilateral basis with

other countries concerning SPS measures that impact on EU exports. Table 2 below shows the number of SPS cases (73) on which the EU has raised its concerns bilaterally (i.e. not necessarily as part of the WTO's dispute settlement procedures) – allocated on the respondent countries.

Table 2: Ongoing bilateral SPS cases as of November 2014 – EU as complainant

Countries where the disputed SPS measures were implemented	Number of SPS cases per country
Argentina, Canada, Pakistan, Philippines, Saudi Arabia, Singapore, Thailand, Turkey, Ukraine	1
Columbia, Ecuador, Egypt, Uruguay, Venezuela	2
Brazil, Malaysia, New Zealand, Peru, Russia, South Korea	3
Australia, India, Indonesia, Japan, Taiwan, United States	4
China	5
Mexico	7
Total of bilateral SPS cases	73

Source: European Commission, DG Trade market access data base.

Moreover, of a total of 43 WTO disputes between 1995 and November 2014 involving the SPS Agreement, the EU has been involved in 14 disputes (5 as complainant and 9 as respondent), whereas the U.S. has been involved in 19 disputes (11 as complainant and 8 as respondent) (see Annex 2). Some of these cases have been going on for many years without any final conclusion being reached. One of the most famous disputes concerning SPS issues is the “Beef-hormones” case between the EU and the U.S., which were subjected to the WTO's dispute settlement system as early as in 1996. We'll analyze the EU-U.S dispute on “beef-hormones” in the following paragraphs.

Case 1 (hard governance): the WTO dispute settlement mechanisms as a means to solve the US-EU ‘beef hormones’ trade conflict

The ‘Beef Hormones case’ between the U.S. and the EU can be traced back to the early 1980s (Pollack and Shaffer 2001; Bermann 2007; Wilson 2007; Johnson and Hanrahan 2010; Peel 2012). As early as in 1981 the EC Council of Ministers adopted a directive (81/602) which lay down the foundation for a general prohibition against the use of hormones except for therapeutic purposes (WTO 1997). The Council of Ministers decided to postpone the adoption of concrete measures pending further investigations. Reports from the EU’s scientific expert groups later showed that natural hormones, when applied properly, *do not* represent any great danger to public health. Based on scientific advice, the European Commission decided in 1984 to draft changes to Directive 81/602 with the intention of allowing the use of natural hormones. The European Parliament went strongly against this and demonstrated moreover strong opposition against the use of hormones in general. In December 1985 the EU introduced a ban on both natural and synthetic hormones and announced that a ban on the imports of animals and meat from animals that have been treated with hormones would be adopted before 1 January 1988. In 1987 the Codex Alimentarius Commission adopted recommendations on the maximum residue limits of synthetic hormones in meat production. Codex also stated that maximum residue limits for natural hormones were not necessary because of the small risk to health (WTO 1997). Codex Alimentarius Commission¹⁰ is an intergovernmental food standards agency established by the United Nations (FAO and WHO) in 1963, which in the WTO is referred to as one of three bodies that develops international standards which are recognized as relevant under the SPS Agreement (Veggeland and Borgen 2005).

The U.S. complained that the EU ban on beef imports based on the prohibition against the use of hormones in meat production, in effect was a NTB that could not be justified under GATT rules. The U.S. tried in the late 1980s to use the dispute settlement mechanism available under GATT to force the EU to lift its ban. Central to the conflict were six hormones – three synthetic and three natural – which the U.S. al-

¹⁰ In 2014, Codex Alimentarius Commission had 185 member countries and one member organization: the EU.

lowed in meat production. In accordance with the GATT dispute settlement procedures, the two trading partners entered into bilateral consultations with the intention of solving the conflict. However, the discussions broke down and the EU blocked the U.S. attempt at bringing the case further in legal proceedings under GATT dispute settlement procedures. In contrast to the procedures under the WTO, each member in GATT had the option of blocking any attempt at bringing a legal case against it under GATT rules (Van den Bossche and Zdouc 2013). In 1989, the EU finally implemented the import ban for all hormone-treated meat. This led the U.S. to implement sanctions against the EU at a value of approximately \$ 100 million.

In 1995, the WTO Agreement (and thus also the SPS Agreement) entered into force. The WTO also included a new dispute settlement mechanism where two elements were particularly important: First, the establishment of a permanent Appellate Body, and second, the introduction of the 'reversed veto' meaning that each WTO member now had the right to bring a case to dispute settlement. The option to block legal proceedings was thus effectively removed. In 1995, the Codex Alimentarius Commission again adopted maximum residue limits for two synthetic hormones and confirmed that this was not necessary for natural hormones. The Codex decision was based on a vote where the EU countries voted against.

In 1996 the U.S. requested consultations with the EU under the new dispute settlement procedures of the WTO.¹¹ In anticipation of the outcome of the WTO legal proceedings, the U.S. had to abolish its punitive measures against the EU. The U.S. argued that the EU ban on hormones was (WTO 1997)...

- ...not based on an acceptable risk and therefore was in breach of Article 5.1 of the SPS Agreement.
- ...maintained without sufficient scientific evidence and was therefore in breach of Article 2.2.
- ...not introduced as temporary measures in accordance with article 5.7.
- ...a breach of Articles 2.2 and 5.6 because it was not based on scientific principles, was not introduced with the only intention of protecting public health and, moreover, was more trade restrictive than necessary to achieve an adequate level of protection.

¹¹ An overview of the WTO's Dispute Settlement Mechanism is included in Annex 3.

- ...discriminating on an arbitrary and unlawful manner in relation to member countries where identical or similar conditions exist and moreover constituted a disguised restriction on trade – both violations of Article 2.3.
- ...not based on relevant international standards and therefore was in breach of Article 3.1.
- ...based on arbitrary and unlawful determination of level of protection and therefore constituted a discriminatory measure or disguised restriction on trade, which violates Article 5.
- And, that it violated Article 3.3 since the deviation from international standards was not justified.

The EU and the U.S. did not come to an agreement during the consultations and consequently, the U.S. then requested the WTO to establish a Panel to consider the case. On 30 June 1997 the Panel report was submitted to the relevant parties (WTO 1997). The Panel undertook a relatively strict interpretation of the SPS Agreement and ended up by giving considerable support to the claims of the U.S., including that the EU import ban was in conflict with Articles 3.1, 3.3, 5.1 and 5.5 of the SPS Agreement. The Panel's main conclusion was that the import ban was in conflict with the SPS Agreement and it recommended that the Dispute Settlement Body (consisting of all WTO members) should request the EU to bring its measures into conformity with SPS rules. The EU appealed many of the Panel's rulings and the case was therefore brought to the WTO Appellate Body, which in January 1998 submitted its report (WTO 1998). The Appellate Body upheld most of the Panel's findings and conclusions, including the main conclusion that the EU measures were in conflict with the EU's obligations under the SPS Agreement and therefore had to be brought into conformity with the provisions of the agreement. Thus, neither the Panel nor the Appellate Body had found that the EU had provided sufficient evidence to justify the import ban on hormone-treated meat. The Appellate Body nevertheless either reversed or modified some of the Panel's finding (WTO 1998:102-104).

The Appellate Body reversed the Panel's general interpretative ruling that the SPS Agreement necessarily allocates the whole evidentiary burden to the Member imposing a SPS measure (WTO 1998: 36-41). It stated that the complainant first must provide evidence and legal arguments sufficient to substantiate that the defendant's measures are inconsistent with the SPS Agreement (c.f. provide a *prima facie* case) before "the burden of proof moves" to the defendant to bring forward evidence and arguments to disprove the complainant's claims (WTO

1998:41).¹² The Appellate Body also reversed the Panel's conclusion that when a measure is not based on an international standard in accordance with Article 3.1, the burden is automatically on the Member imposing the measure to show consistency of the measure with Article 3.3 (scientific justification). Furthermore, the Appellate Body reversed the Panel's ruling that the term "based on" (c.f. *based on* international standards, guidelines and recommendations), as used in Articles 3.1 and 3.3 has the same meaning as "conform to", as used in Article 3.2. This may be interpreted as allowing for greater latitude with respect to how to comply with international standards.

The Appellate Body modified the Panel's interpretation of "risk assessment" by holding that neither Article 5.1 and Article 5.2 nor Annex A of the SPS Agreement require a risk assessment to establish a minimum quantifiable magnitude of risk (*ibid.*). Moreover, these provisions do not exclude that a risk assessment may take into account other (qualitative) factors. The Appellate Body also reversed the Panel's finding that the term "based on" as used in Article 5.1 ("based on an assessment (...) taking into account risk assessment techniques developed by the relevant International Organization") entails a "minimum procedural requirement" that a Member imposing a SPS measure must submit evidence that it actually took into account a risk assessment when it enacted or maintained the measure. The Appellate Body also reversed the Panel's findings and conclusions on Article 5.5, which meant that the Appellate Body did not find that the EU measures had resulted in "discrimination or a disguised restriction on international trade" (*ibid.*). The Appellate Body nevertheless upheld the Panel's ruling that the EU's import ban was in conflict with the SPS Agreement, based primarily on the conclusion that the EU's measures were inconsistent with the requirements of Article 5.1, i.e. that the *EU had not ensured* that its measures were "...based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations" (WTO 1997, 1998: 104).

The Appellate Body assessments were perceived as important, since they could be perceived as a "softening" in relation to the Panel interpretations of the SPS Agreement, both with regard to the burden of proof, deviations from international standards and the requirements for risk assessments. EU perceived this as a signal that even if they could not demonstrate a quantifiable measurable risk to human health from eating hormone-treated meat they could justify the import ban by scientifically demonstrating that there are *certain risks* involved. How-

¹² The WTO Appellate Body's use of legal concepts such as "prima facie case" and the move or the shift of the "burden of proof" has been much discussed and even criticized for being ambiguous and potentially misleading (Echols 2001: 140-147; Barceló 2009). However, in this paper, we only refer to the actual WTO rulings and do not further explore the controversies regarding these legal issues.

ever, based on the recommendations and rulings of the Panel and the Appellate Body, the EU was requested in 1998 by the Dispute Settlement Body to bring its measures in conformity with the SPS Agreement. When the EU failed to comply with this decision by the deadline of 13 May 1999, the U.S. made a request for the approval of retaliatory measures on the import of EU produce at the value of \$ 202 million. The Dispute Settlement Body then authorized on 26 July 1999 penalties at the value of \$ 116, 8 million (WTO 1999).¹³ Among the EU products affected were meat products, Roquefort cheese, chocolate, juices, jams and fresh truffles.

Then, in 2003 the EU informed at a meeting in the Dispute Settlement Body that the EU had adopted a new Directive (2003/74EC) regarding the prohibition of the use of certain hormones in stock farming and that, because the Directive was based on a new risk assessment carried out by an independent scientific committee, there was no longer any legal basis for the U.S. to continue to impose retaliatory measures (WTO 2015a). The EU thus demanded that the U.S. should lift its sanctions. The U.S. rejected the claim that the EU had implemented the recommendations and rulings of the Dispute Settlement Body and therefore refused to lift its sanctions. The EU then, in 2004, filed a request for consultation with the U.S. on this matter under the Dispute Settlement Procedures based on the claim that the U.S. should remove its retaliatory measures insofar as the EU had removed the measures found inconsistent with the SPS Agreement. On 25 September 2008 the EU and the U.S. notified the Dispute Settlement Body that in relation to the ongoing dispute, they had agreed on a Memorandum of Understanding (MoU) regarding the importation of beef from animals *not* treated with certain growth-promoting hormones and the increased duties applied by the U.S. on certain EU products (*ibid.*; United States Trade Representative 2008). Under the terms of the MoU, the EU accepted to provide significant access to U.S. produced beef from cattle not treated with growth-promoting hormones (first year up to 20.000 tons at zero duty – with the potential to increase to 45.000 tons in the fourth year). The U.S. agreed on its side to delay the imposition of additional duties on EU produce, which had been scheduled to go into effect prior to the MoU. Moreover, the U.S. would work on the suspension of duties already imposed on produce from the EU. In 2013, it became clear that the EU and the U.S. were not able to move to the planned Phase 3 of the MoU where the U.S. would remove all trade sanctions. However, on 14 April 2014 the EU and the U.S. notified the Dispute Settlement Body of a revision made to the MoU on 21 October 2013 (WTO 2015a). This revision meant that the EU maintains its duty-free quotas on U.S. beef until August 2015 at the quantity of 45 000 tons while allowing for negotiations of a definite solution to the dispute by this date.

¹³ The United Kingdom was the only EU member state not having any products on the U.S. “blacklist” of retaliatory measures (additional duties).

Thus, the MoU has just been a temporary arrangement pending a final solution to the dispute. Nevertheless, the implementation of the MoU clearly had a positive effect on U.S. exports to the EU 28, which is shown in Figure 5 below. Figure 5 illustrates that as early as in 1989, U.S. beef exports to the EU were very low—due mainly to the EU restrictions on the use of hormones in meat production and the *de facto* import ban that followed from these rules. The sharp increase in beef exports in the late 2000s illustrates the effect of the dialogue that was initiated bilaterally between the EU and the U.S. on allowing trade in beef without compromising the EU ban on the use of hormones – ending up with the import quotas as agreed upon in the MoU. Figure 5 also shows that U.S. exports of beef to rest of the world sharply declined in 2004. The decline was caused by an incident of BSE (c.f. Mad Cow Disease) in U.S. cattle in 2003, which triggered trade restrictions on beef imposed by major importing countries around the world (FAO 2004; Almas et al. 2005; Taha and Hahn 2012). Exports to the rest of the world regained a few years later (but then under new trade conditions), as shown in figure 5.

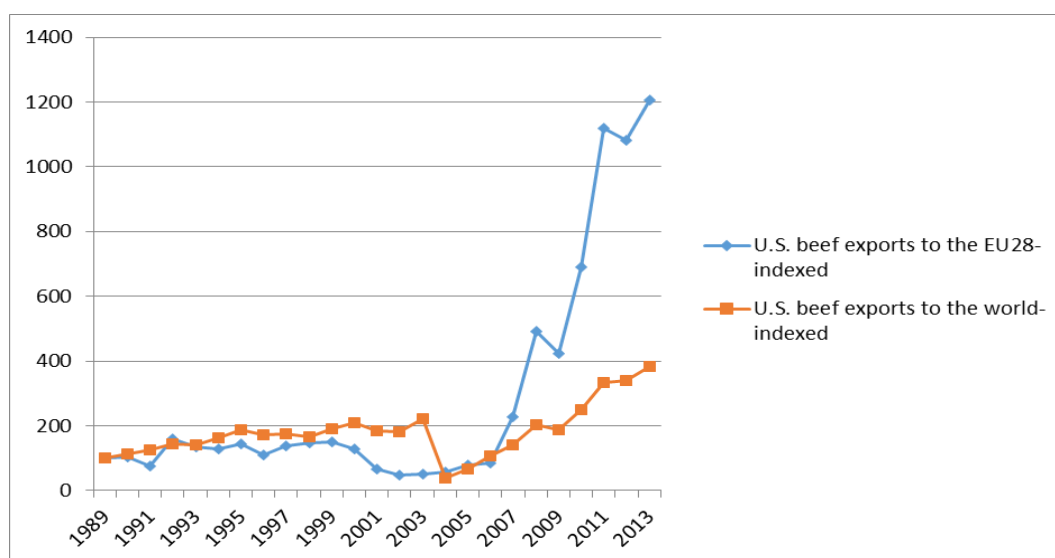


Figure5: U.S. beef exports 1989-2013 (value)
(Source: U.S. Census Bureau Trade Data).¹⁴

¹⁴ Figure 5 is indexed (1989=100) in order to optimize visual presentation of variations over time. Numbers are originally in 1000 U.S. dollar.

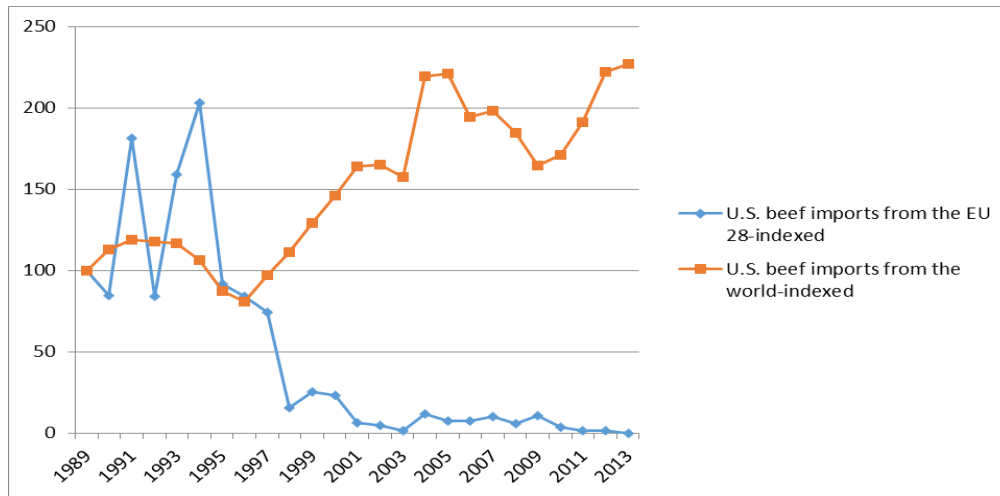


Figure 6: U.S. beef imports 1989-2013 (value)
(Source: U.S. Census Bureau Trade Data).¹⁵

Figure 6 shows some peculiar developments in beef U.S. imports – caused mainly by the outbreaks of BSE in Europe in the mid- to late 1990s (van Zwanenberg and Millstone 2005). The BSE crisis seriously “hit” the EU in 1996, when a possible connection between BSE and a new version of the human disease Creutzfeldt-Jacob disease was published, subsequently triggering, in effect, a ban in many countries on imports of bovine products from the EU (Vos 2000; *ibid.*). The U.S. ban was in place until January 2015, when the U.S. government decided to progressively re-open its market to imports of beef from the EU (European Commission 2015a). Figure 6 also shows that although beef imports from the EU more or less ceased entirely, there was at the same time an increase in beef imports from the rest of the world.

Thus, figures 5 and 6 are good illustrations of the potentially severe impact of NTBs on trade. The U.S. has experienced this as a beef importer, when the BSE crisis hit the EU in 1996, and as a beef exporter, when the incident of BSE was uncovered in 2004, as well as the longstanding EU restrictions on imports of hormone-treated beef. The EU has also experienced the trade effects of NTBs as an exporter, caused by the BSE crisis, and as an importer, based on the ban on hormones in beef. However, figure 5 also illustrates the significant effect of engaging in alternative arrangements to allow for trade. After the MoU came into place, beef exports from the U.S. to the EU had an immediate sharp increase. This also illustrates the negative effect that the EU prohibition on hormones had on transatlantic trade prior to the MoU. The question then is of course whether the quotas for import of beef into the EU from the U.S. will continue after August 2015 or if the situation will return to the situation prior to the implementation of the MoU.

¹⁵ Figure 6 is indexed (1989=100) in order to optimize the visual presentation of variations over time. Numbers are originally in 1000 U.S. dollar.

We see that despite being handled by the powerful WTO dispute settlement mechanism, the ‘beef hormones dispute’ between the EU and the U.S. has in practice remained without any permanent solution ever since the late 1980s. However, as both Parties have chosen to act according to WTO rules and not engage in a purely bilateral conflict, the WTO dispute settlement mechanism may have contributed to avoid a further escalation of the conflict, i.e. to cause greater injuries to trade in other products than beef (c.f. also that the WTO dispute settlement body authorized less strict retaliation measures than initially requested from the U.S.). The ‘beef hormones case’ also illustrates that although the SPS Agreement clearly restricts – legally – the member’s freedom to adopt measures that in effect become technical barriers to trade, in practice it is difficult to “force” the members to comply with their obligations under the agreement when strong interests and preferences are involved.

Both the EU and the U.S. seem to have had strong interests in the ‘beef hormones-case’: the U.S. economically related to the beef exports, the EU based on health- and consumer-protection. In this situation, the EU has also been accused of using health-protection concerns as a cover for protectionism, thus not really having any real interest in finding a solution through conflict-resolution. Notwithstanding the question of whether protectionist interests have been involved or not, the history of the ‘beef hormones case’ shows that the EU has been concerned with searching for and applying science-based arguments to justify the ban. It is also important to note that the EU’s ban on hormones in meat production has not only affected the U.S., but all meat producers within the EU, as well as all meat producers wanting to export to the EU. Thus, as the WTO Appellate Body also concluded, the ban cannot be considered as an arbitrary and discriminatory regulatory measure as such. In addition, the U.S. retaliation measures have caused real injuries to EU industries thus creating an economic interest in the EU to find a solution to the dispute. Thus, put together, these factors indicate that the EU has in fact been interested in finding ways to solve the dispute, but without compromising health-protection concerns. The fact that the EU and the U.S. chose to “leave” the WTO dispute settlement track and use a “softer” conflict-resolution instrument by engaging in the MoU actually indicates a common interest in solving the dispute and re-open markets.

Case 2 (soft governance): the use of an equivalence agreement to facilitate trade in U.S.-EU food trade relations

After six years of negotiations, the EU and the U.S, finally signed the Veterinary Equivalency Agreement (VEA) on July 20, 1999.¹⁶ This VEA is of particular importance for facilitation of world trade because of the extensive trade volume that exists between the two parties. According to the European Commission, the EU and the U.S. accounted between them for about 37% of world merchandise trade and 45% of world trade in services at the time of the signing of the VEA and they were (and still are) each other's single largest trading partner (European Commission 2001: Chapter 1, A5). The VEA covers two-way trade in various animal products valued at about \$3 billion annually (Becker 1999). The VEA document includes a list of all the individual products that are covered by the agreement, and each of the products is assigned a level of equivalency for the respective requirements attached to it. The rankings are listed in Table 3 below (USDA Foreign Agricultural Service 2005: 5; 2010).

Table 3: Equivalency Rankings: an explanation

Ranking categories	Implications for trade
Yes (1)	The importing Party agrees that the exporting Party's measures achieve the importing Party's appropriate level of sanitary protection.
Yes (2)	The importing Party agrees that the exporting Party's measures, with the special conditions set out, achieve the importing Party's appropriate level of sanitary protection.
Yes (3):	Equivalency agreed in principle, subject to satisfactory completion of the actions. Pending completions, trade shall occur on the basis of the special conditions set out.
NE:	Not evaluated (NE). Trade shall occur on the basis of compliance with the importing Party's requirements.
E	Still evaluating. Trade shall occur on the basis of compliance with the importing Party's requirements.

¹⁶ The presentation and analysis of the VEA between the EU and the U.S. builds to a large extent on Veggeland (2006, paragraph 3.3.2), but the case has been reanalyzed, updated and supplemented by findings from the USDA Foreign Agricultural Service report from 2010 and trade data from U.S. Census Bureau.

Yes 1 is the highest degree of equivalency that can be achieved under the agreement and implies that trade can occur without impediments caused by the requirements evaluated (c.f. full equivalency). The other two rankings involving agreed equivalence (Yes 2 and Yes 3) set out special conditions for trade to occur. Table 4 lists the total condition of equivalency under the VEA as of 2010 (USDA Foreign Agricultural Service 2010).

Table 4: Equivalency rankings for traded products under the EU-U.S. VEA as of 2010¹⁷

	Yes 1	Yes 2	Yes 3	E	NE	Total
U.S. regulations/standards	28 (30)	36 (36)	10 (11)	17 (17)	31 (32)	122 (126)
EU regulations/standards	3 (4)	8 (8)	9 (10)	21 (21)	82 (82)	123 (125)

First, it is interesting to note that the number of equivalency rankings has actually gone down since 2005 – from a total of 251 in 2005 to a total of 245 in 2010. Yes 1 and Yes 2 rankings have gone down from 78 to 75. This illustrates the problems of maintaining equivalency. Equivalency rankings for U.S. regulations/standards give favourable conditions for EU exports to the U.S.; equivalency rankings for EU regulations/standards give favourable conditions for U.S. exports to the EU. Table 4 shows that the EU has achieved considerably more of the two highest equivalency rankings (Yes 1 and Yes 2) on U.S. regulation/standards than vice-versa. Thus, the U.S. has provided more favourable conditions to EU products than the EU has provided for U.S. products (see USDA Foreign Agricultural Service 2010). However, the number of equivalency rankings does not necessarily say anything about the value or quantity of trade in these products. Thus, more information about the relative trade significance of each product is needed in order to make a more comprehensive evaluation (Annex 3 shows equivalency rankings distributed on products). Furthermore, because of the structure of the VEA it is difficult to estimate accurately the trade implications of the agreement's equivalency rankings. Five years after the VEA entered into force, the U.S. Department of Agriculture's (USDA) Foreign Agricultural Service nevertheless made some attempts at determining the trade impact of the VEA (USDA Foreign Agricultural Service 2005). The 2005 report compares data on trade in all the products covered by the VEA from the year the agreement went into effect (1999) against data on trade in all such products for every year up to and including 2004 (see Table 5).

¹⁷ The numbers in parenthesis are equivalency rankings reported in 2005 (USDA Foreign Agricultural Service 2005).

Table 5: Value of trade in all products covered by the VEA between the EU and the U.S – 1999 and 2004.

	U.S. exports to the EU		EU exports to the U.S.	
	1999	2004	1999	2004
Trade value all products	\$2,635 billion	\$3,039 billion	\$2,261 billion	\$3,066 billion
Trade value Yes 1 Products	\$239,251 thousand	\$391,144 thousand	\$145,028 thousand	\$154,892 thousand

The data shows that in the period 1999–2004 the trade of VEA products from the EU to the U.S. and vice versa *increased in value*. Thus, the value of trade in all such products has increased in the period 1999–2004 for both parties to the agreement. The data further indicate a clear increase in the value of trade in the products with the highest equivalency ranking (YES 1 products). Table 5 shows a clear increase in U.S. exports to the EU. This is largely caused by exports of high value Yes 1 products such as fish. However, when we look at trade volume measured in *quantities*, the picture changes somewhat. This is partly caused by fluctuations in exchange rates. As for U.S. exports, quantities increased significantly in only a very few categories, namely live animals, fish, dairy products and bird eggs, products of animal origin NESOI¹⁸, and raw hides and bovine skins. The increase in the value of EU exports to the U.S. is not reflected by a corresponding increase in the quantity of exports. However, there was an increase even in export quantities in the categories of meat and edible meat offal, food preparations NESOI, and Casein. Thus, for important YES 1 products such as fish products from the U.S. and meat and edible meat offal products from the EU, the positive effect of the VEA on trade seems to hold, even when exports in such products are measured in quantities (ibid).

The U.S. report on the VEA from 2010 points out, that U.S. exports to the EU of products covered by the VEA rose by 44 percent from 1989 to 1999 and were then worth more than \$2 billion in value (USDA Foreign Agricultural Service 2010). Between 1999 and 2009 U.S. exports of VEA products increased by 67 percent, reaching a value of more than \$3.5 billion (ibid.). The report thus points to the fact that the rate of growth for bilateral trade between the U.S. and the EU increased after the implementation of the VEA in 1999, but remained steady for U.S. exports to the world. The report therefore suggests that the VEA had affected trade between the U.S. and the EU positively. However, the report also comments upon the need for greater equivalency for U.S. products under the VEA in order to accelerate the rate of growth in U.S. exports (ibid.). The disproportionate distribution of equivalency rankings presented in Table 4 indicates that there is a potential under the VEA to establish more favorable conditions for transatlantic trade. Some of the same trade trends that were presented in the U.S. reports of

¹⁸ NESOI = Not Elsewhere Specified Or Indicated.

2005 and 2010 (USDA Foreign Agricultural Service 2005; 2010) are also reflected in figures 7 and 8 below.¹⁹

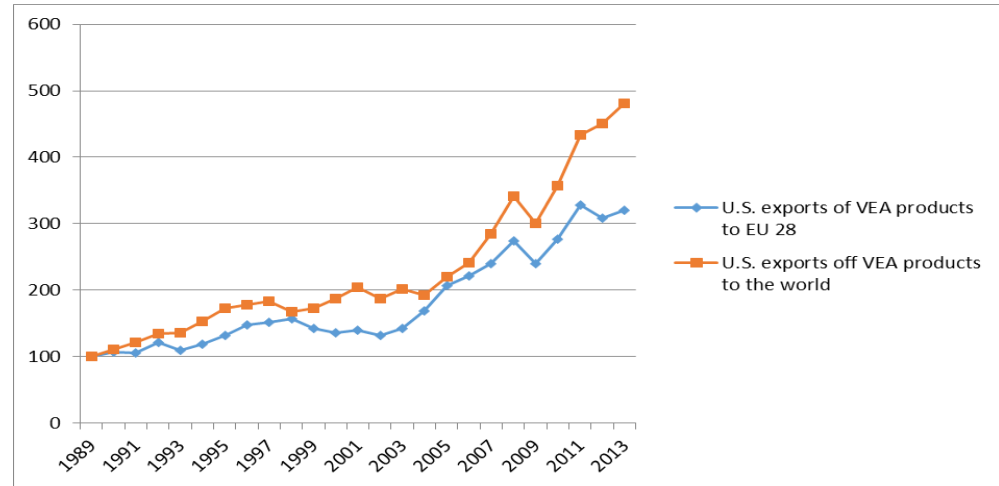


Figure 7: U.S. exports of VEA products 1989-2013 (value)
(Source: U.S. Census Bureau Trade Data).

Figure 7 shows the development of U.S. exports of VEA products between 1989 and 2013 to the EU 28 and the world respectively. More or less in line with the findings in the 2010 report (USDA Foreign Agricultural Service 2010), we find that U.S. exports of VEA products to the EU in the time periods 1989-1999 and 1999-2009 rose by 43% and 68% respectively, whereas the similar numbers for U.S. exports to the world were 73% and 77%.

¹⁹ Figure 6 and 7 are indexed (1989=100) in order to optimize visual presentation of variations over time.

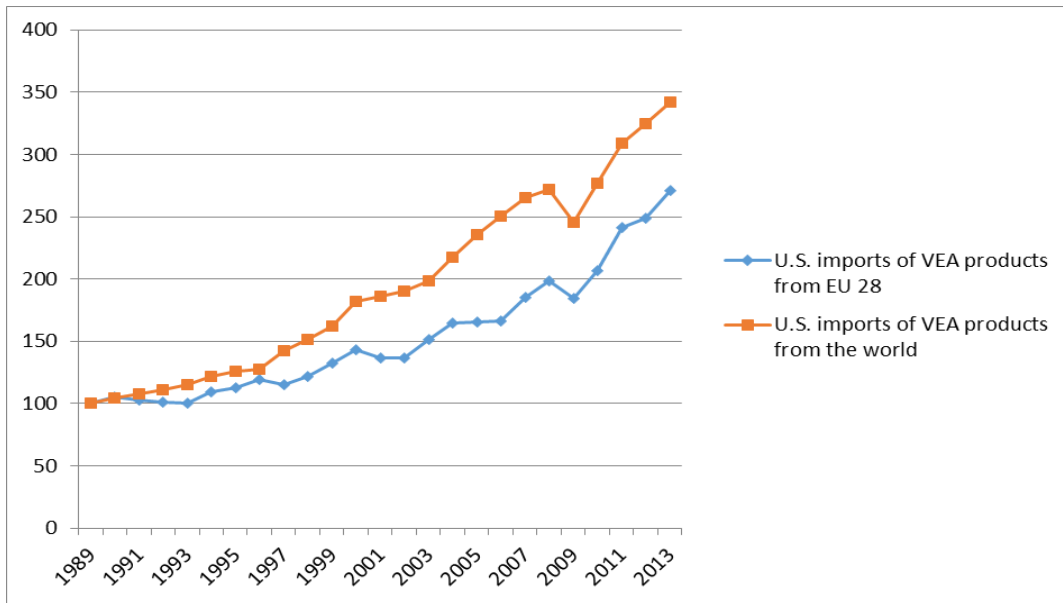


Figure 8: U.S. imports of VEA products 1989-2013 (value)
(Source: U.S. Census Bureau Trade Data).

Figure 8 shows the developments of U.S. imports of VEA products between 1989 and 2013. U.S. imports from the EU in the time periods 1989-1999 and 1999-2009 were 33% and 39% respectively, whereas the similar numbers for U.S. imports from the world were 62% and 51%. Thus, the growth in imports from the rest of the world slowed down the first decade after the VEA between the U.S. and the EU went into force. Between 2009 and 2013 trade in VEA products continued to grow. However, in this period the growth in U.S. exports to the EU is weaker (33%) than growth in exports to the rest of the world (60%). Still, the growth in imports from the EU (47%) is stronger than from the rest of the world (39%).

Table 6 below summarizes the comparisons between U.S. trade in VEA products with the EU and the world respectively. The comparison shows that the growth in trade in VEA products between the U.S. and the EU has increased after the VEA was put in place in 1999 and that this growth has been clearly more prominent in trade relations between the EU and the U.S. than in trade relations between the U.S. and the rest of the world. This indicates that the VEA, despite all implementation problems, has created more favorable trade conditions.

Table 6: Growth in trade in VEA products (1989 – 2013)

	U.S. exports to the EU - growth %	U.S. exports to the world – growth %
1989-1999	43	73
1999-2009	68	77
	U.S. imports from the EU – growth %	U.S. imports from the world – growth %
1989-1999	33	62
1999-2009	39	51
	U.S. exports to the EU -growth %	U.S. exports to the world – growth %
2009–2013	33	60
	U.S. imports from the EU - growth %	U.S. imports from the world – growth %
2009-2013	47	39

The value of U.S. exports to the EU of VEA products rose from 2 billion U.S. dollars in 1999 to 4.6 billion dollars in 2013; similar numbers for U.S. exports to the world were 17.6 billion dollars and 49.1 billion dollars. The value of U.S. imports of VEA products from the EU rose from 2.2 billion dollars in 1999 to 4.5 billion dollars in 2013; similar numbers for U.S. imports from the world were 18.3 billion dollars and 38.6 billion dollars. After the VEA went into effect in 1999, the growth has generally been higher for bilateral trade between EU and the U.S. than for U.S. trade with the rest of the world, although this picture is more nuanced after 2009. Moreover, and somewhat surprisingly, the numbers show that U.S. exports to the EU had a higher growth than vice-versa for the years studied. However, this may be explained by the massive trade restrictions on EU food imports that were put in place by the U.S. when the BSE crisis hit Europe in the 1990s.

Figures 7 and 8 and Table 6 only provide a general picture of the trade flows, but nevertheless seem to indicate some positive effects of the VEA on transatlantic trade. Even though these effects do not appear as very strong, there are indications of positive effects both at the aggregate level and when we look at specific products (as indicated above). However, according to officials of both the European Commission and the U.S., handling the VEA has not been an easy endeavour.²⁰ First, the negotiations were difficult and time-consuming, lasting more than six years. Second, the parties did not succeed in solving disagreements on one of the most important traded products between the parties, namely poultry. Strong disagreement over hygiene requirements for poultry production continued, despite poultry being covered by the VEA. The core of the disagreement is that the U.S. allows for

²⁰ Interviews conducted with officials of the European Commission's DG SANCO and the U.S. Mission to the European Union, Brussels, October 2005 (Veggeland 2006).

poultry being processed with certain pathogen reduction treatments (PRTs) – such as chlorine dioxide – to ensure food safety, but the EU does not. The VEA was originally supposed to solve the problem by including poultry as a product category destined for equivalence, but the EU has continued all up until 2015 to prohibit the use of PRTs and thus the importation of poultry from the U.S. treated with these substances (Johnson 2015). Poultry actually has a Yes 1 equivalency for animal health and Yes 3 equivalency for human health under the VEA (USDA Foreign Agricultural Service (2010). Still, trade in poultry between the EU and the U.S. has declined in the period 2005-2009 (*ibid.*). One factor affecting trade in poultry negatively is of course the above-mentioned disagreement on PRTs in poultry production. This disagreement actually led the U.S. to file a WTO complaint against the EU in January 2009 (Johnson 2015). A WTO Panel was established in November 2009, but the case has been put on hold pending further consultations between the parties, including discussions taking place within the framework of the ongoing TTIP (Transatlantic Trade and Investment Partnership) negotiations between the EU and the U.S. The U.S. poultry industry has indicated that it is unlikely to support a TTIP agreement if it does not provide better access for U.S. poultry products to the EU market (Johnson 2015:6).

Third, it has proved difficult to perform new equivalency determinations (between 1999 and 2006 determination of equivalency was performed for only two new product categories), as well as to uphold established equivalency determinations over time. These problems are among other things due to changes in circumstances and the fact that national requirements continuously are updated. One example of problems in upholding equivalency over time is trade in seafood under the VEA (United States Trade Representative 2014: 49). Prior to 2008, the EU authorized imports of U.S.-origin molluscan shellfish based on equivalence assessments under the terms stated in the VEA. In 2008, the European Commission's DG SANCO notified the U.S. that the import approval (and thus the equivalence determination) for U.S.-origin molluscan shellfish would expire at the end of 2009. Thus, the EU began barring imports of all U.S.-origin molluscan shellfish other than scallops in July 2010 – despite protests coming from the U.S. government. These developments led the U.S. government to engage actively with the European Commission with the aim of providing the information the EU demanded in order to regain an equivalence determination and thus to allow imports of U.S. molluscan shellfish to resume. As of early 2014, the case was not yet solved (*ibid.*). Another example of the problems of upholding equivalence determinations is EU-U.S. trade in wheat (United States Trade Representative 2014: 50). Many EU countries test U.S. shipments of wheat for Karnal Bunt (KB=a fungal disease) spores. The U.S. has pointed out that there has never been a confirmed case of KB contamination of a U.S. wheat shipment in the 20 years that have gone since KB was first found in the U.S. (*ibid.*). Moreover, the U.S. claims that these tests can produce false positives, resulting in lost

shipments and thus lead to unjustified restrictions to trade. The U.S. also points out that the EU has refused to accept certain official sampling and testing requirements of the USDA's Federal Grain Inspection Service (FGIS) in shipments of U.S. wheat for export as equivalent to the EU testing methods. Thus, the USDA is working with technical experts in the European Commission with the aim of ensuring EU recognition of the sampling and testing methods as equivalent (*ibid.*).

Fourth, differences in how the sanitary and phytosanitary area is being organized in the EU and the U.S. have also caused some problems regarding the administration of the equivalency agreement. This last point illustrates that the effectiveness of a "soft" trade-facilitating tool such as equivalence is enhanced when there is compatibility between regulatory systems involved – and vice-versa, determining equivalence is harder the more different the systems are. Both EU and U.S. officials have stressed that degree of system compatibility is important with regard to how and whether the equivalency agreement works. This affects negotiation processes, as well as the operation of equivalency agreements.

In the EU all VEAs are administered by the European Commission's DG SANCO. This is in accordance with the implementation of major reforms in EU's food regulation whereby responsibilities for food safety policies have ended up as the responsibility of DG SANCO (Ugland and Veggeland 2006). Hence, because the primary responsibility for the sanitary and phytosanitary area and VEAs is placed in DG SANCO, the other parties to the EU's VEAs (the countries themselves) only have to relate to one single authority regarding the follow-up of the agreements (USDA Foreign Agricultural Service 2005: 4). With regard to *monitoring* the sanitary equivalency of a product traded between the EU and the U.S., there is a delineation of responsibility according to whether the product is being imported or exported (*ibid.*). The primary responsibilities for EU exports to the U.S. lie with the individual member state involved in the exportation. These responsibilities include the control of production requirements and the issuing of health certificates. EU Member States must either conform to the standards of the importing country, or alternatively base the exports on possibly agreed equivalency determinations with this country. The Member States have also retained important tasks and responsibilities with regard to imports, but in this area they are primarily charged with complying with EU regulations. The EU has a comprehensive set of harmonized legislation which regulates imports of food and veterinary products from third countries and is enforced through customs and border inspections (*ibid.*; Ugland and Veggeland 2004). Thus, in this area national customs and food inspection authorities act as agents of the European Commission, which is the supreme authority for regulating imports into the Single European Market (Ugland and Veggeland 2006).

The fragmented structure of the U.S. regulatory systems stands out in contrast to the EU's single authority structure (USDA Foreign Agricultural Service 2005: 4; United States Trade Representative 2014). Depending on the product being traded, responsibilities for domestically produced as well as imported veterinary products, encompasses a large number of agencies: U.S. Trade Representative (USTR), U.S. Department of Agriculture (USDA), Foreign Agricultural Service (FAS), Animal and Plant Health Inspection Service (APHIS), Food Safety and Inspection Service (FSIS), U.S. Environmental Protection Agency (EPA), U.S. Food and Drug Administration (FDA), U.S. Department of Commerce (DOC), Fish and Wildlife Service (FWS), National Oceanic and Atmospheric Administration (NOAA)²¹, Federal Grain Inspection Service (FGIS), Agricultural Marketing Service (AMS), and U.S. Department of State (USDA Foreign Agricultural Service 2005; United States Trade Representative 2014). Thus, there are some significant differences between the EU and U.S. regulatory systems. EU's system is basically characterized by a demarcation of responsibilities along the lines of imported vs. exported products as well as by a horizontally integrated food safety system where primary responsibility for safety regulation of food imports and for consumer and health protection is placed within a single agency, DG SANCO. Furthermore, in line with this structure there is a clear separation of, on the one side, the quality, technical and commercial aspects of food regulation and, on the other side, the health and consumer protection aspects. The U.S. system is more fragmented and characterized by a number of different agencies with jurisdiction over different products and processes. Thus, demarcation of responsibilities in the U.S. runs along the lines of the products being traded. This has created a mismatch between the EU and U.S. systems, which sometimes has caused communication problems as well as problems of maintaining trust and confidence in each other's systems.²²

The VEA between the EU and the U.S. is an example of the use of an alternative 'route' of solving conflicts on NTBs, which exists under the SPS Agreement. Equivalence assessments allow for trade to continue while at the same time keeping (different) domestic regulations in place. However, to agree on and maintain equivalence of specific regulations is challenging as it demands extensive information-exchange, regulatory dialogue and other confidence- and trust-building activities between regulatory authorities. These "soft governance" mechanisms, which are part of equivalence agreements, may be effective means of avoiding conflicts on NTBs. However, equivalence agreements are resource demanding, both to achieve and maintain, and thus seem to only have limited effect on trade. Moreover, under poor implementation "soft governance" may also "harden", i.e. escalate into formalized legal disputes. The case of trade in poultry between the EU and U.S. mentioned above is an example of this. The fact that voluntary Codex

²¹ NOAA was formerly known as National Marine Fisheries Service (NMFS).

²² Based on interviews with EU and U.S. officials 2005 (Veggeland 2006).

standards can be used to fulfill the obligations under the WTO's SPS Agreement and in that way has achieved a "semi-binding" status is another example (Veggeland and Borgen 2005). On the other side, "hard governance" may also soften, which the "beef hormones" case is an example of. In this ongoing dispute the EU-U.S. chose after many years to shift from the use of WTO dispute settlement procedures to entering into a dialogue and negotiations on a MoU.

The experiences of the EU and U.S. trade relations confirm the constraints, under which equivalence agreements can work. However, equivalence can be an effective tool when regulatory differences and positions are locked and there are gains to be made by entering into long-term cooperation and dialogue in order to move regulatory systems and understanding closer (see also Table 6 below). For example, the fact that technical regulations, including SPS measures, are part of the ongoing TTIP negotiations between the EU and the U.S. may indicate that transatlantic regulatory dialogues, which have been going on since the 1990s, have created a more advantageous 'climate' for regulatory cooperation. In this way, "soft governance" may have prepared the way for including regulatory measures in bargaining processes and hard law agreements and thus for a faster (and easier) move towards regulatory convergence. It is moreover interesting to note that even though the TTIP negotiations aim at establishing a (hard law) trade agreement, the EU proposals for a legal text in the TTIP chapter on regulatory cooperation predominantly refer to soft governance mechanisms such as consultations, bilateral cooperation mechanisms, information and regulatory exchanges, and mutual recognition of equivalence (Moyens 2015; European Union 2015b).

Moreover, the EU proposal on a SPS chapter in TTIP, published on January 7 in 2015, illustrates the emphasis being put on soft governance mechanisms to facilitate trade (European Union 2015a).²³ In this proposal, the EU stresses that the EU and the U.S. should respect each other's regulatory systems as well as risk assessment, risk management and policy development processes (ibid.). The proposal does not suggest comprehensive harmonization efforts, but instead refers to soft governance tools such as improved communication, cooperation, transparency, information exchange, technical consultations and, of course, equivalence as means to facilitate trade. The proposal includes a separate provision on equivalence, which to a large degree is based on the principles laid down by the WTO's SPS Agreement. The EU proposes to set up a separate joint management committee for SPS measures, which will, among other things, monitor the implementation of the SPS chapter of the TTIP Agreement and examine any matters that arise, to provide direction for conflict resolution, to provide a regular forum for exchanging information relating to the Parties' regulatory systems, including the scientific basis, to prepare and maintain a doc-

²³ The full text of the EU proposal is enclosed in Annex 5.

ument on detailing state of discussions on the work on equivalence recognition, and to “facilitate improved understanding between Parties related to the implementation of the SPS Agreement” (ibid.). It is also interesting to note that the EU proposal recognizes the achievements that have been accomplished under the EU-U.S. VEA and confirms the intention to continue this work under the framework of TTIP – the SPS chapter in TTIP is supposed to replace the VEA.

Thus, the TTIP negotiations on SPS issues do not appear to include new ambitious and comprehensive attempts at harmonizing or converging, the EU and U.S. regulatory systems. Instead, the TTIP negotiations on SPS issues seem to focus on “softer” means of facilitating trade. It seems reasonable to relate this focus to the EU-U.S. experience from (and attempts at) solving regulatory disagreements and disputes – experiences, which include tough conflicts such as the beef hormones dispute analyzed in this paper, as well as the regulatory cooperation and dialogue that has been taking place within the VEA framework since 1999.

Dispute settlement and equivalence: analyzing the effectiveness of 'hard' and 'soft' governance in conflict-resolution

In practise, both hard law/governance and soft law/governance is used in international trade relations (Shelton 2000; Pollack and Shaffer 2001, 2010, 2012). Moreover, because of the general lack of powerful compliance and enforcement mechanisms, the actual difference between hard law/governance and soft law/governance is not that evident as the ideal types would imply. Nevertheless, there are some evident implications of choosing either a hard governance tool or a soft governance tool, which is illustrated in this study by the analyses of the use of dispute settlement and equivalence. Enacting dispute settlement procedures means that logics of diplomacy and intergovernmentalism prevail, that disagreements become formalized and judicialized, and that the threat of authorized punishments and sanctions is introduced. Conflict resolution is to a large degree taken care of by politicians, lawyers, diplomats and high level officials. Thus, when preferences and interests are strong, the use of dispute settlement may simply "cement" and "lock" conflicts. SPS measures are about life and health protection, i.e. basic and essential concerns. Thus, the use of dispute settlement in this area may be expected to have a high probability of ending up in locked situations. This is basically what happened in the "beef hormones" dispute between the EU and the U.S – a conflict that in practise has lasted since the end of the 1980s and where the use of dispute settlement procedures did not bring forward a quick solution. Entering into processes of mutual equivalence assessments means that logics of transnational regulatory governance and transgovernmentalism (Slaughter 2004: 36-64) prevail, that disagreements are handled within informal dialogues, and that threats, punishment and sanctions are not considered as an appropriate part of the discourse. Conflict resolution (and thus diplomacy) is to a larger extent taken care of by regulators, scientists and low-level officials (ibid.). The threat of punishment is not put up close and the risk of locking situations is therefore lower. However, the experience from the VEA between the EU and the U.S. shows that equivalence agreements are no quick fix solutions. They may be *necessary* to create common understanding, confidence, faith, and trust between regulators and scientists, as well as politicians, on both sides, but are *not necessarily sufficient* to facilitate trade.

Thus, there are clear limitations with regard to applying dispute settlement as well as equivalence as trade facilitating tools. Dispute settlement may not be an effective (nor desirable) instrument to use when the involved parties have strong beliefs in the necessity of maintaining their domestic (trade restrictive) measures based on legitimate health concerns. Dispute settlement is simply not an effective instrument to solve conflicts on trade-restrictive SPS measures when disparities between different states' SPS regulations are based on fundamental differences in scientific opinions and regulatory culture. The effectiveness of dispute settlement is thus conditioned by the nature of interests and preferences ("how unitary and strong?"), as well as by the nature of the regulatory concerns ("how fundamental and essential"?). A reasonable assumption is that when preferences are strong and fundamental concerns such as health protection are at stake, the threshold for succeeding in solving conflicts through dispute settlement is high. In such situations, "soft governance" can appear as the only alternative way to "move" a locked conflict further.

As illustrated in this paper, one way of applying "soft governance" is to enter into negotiations on equivalence agreements. To determine equivalence of individual regulations is one way of moving towards regulatory convergence and thus of solving the problem of NTBs. However, equivalence agreements may be costly to negotiate and maintain. Also, they normally necessitate some prior harmonization before equivalence assessments can take place. Thus, negotiations of VEAs are normally initiated with partners that have a comparable level of development; and even then, the agreements may be very difficult to implement in practise. Another aspect is that it has proven difficult to measure precisely the trade benefits derived from VEAs. In fact, comments made by officials of both the EU and the U.S. indicate that the costs are sometimes perceived to exceed the benefits (Veggeland 2006). In practise it has proven difficult to perform new equivalence assessments within established equivalence agreements, which is partly why the European Commission often chooses to refer to them as "veterinary agreements" instead of "equivalence agreements". Moreover, to negotiate and maintain VEAs demand that the involved countries have relatively advanced levels of infrastructure and administrative and regulatory capacity. Thus, the EU's VEAs have been negotiated with either advanced developed countries (such as United States, Canada and Australia) or advanced developing countries (such as Chile, Mercosur).

The basic objective of equivalence agreements is of course to facilitate trade. The VEA between the EU and the U.S. is an example of an agreement with big trade-facilitation potential due to the large amount of trade involved. Thus, returns from establishing equivalence agreements may of course be of an economic nature – based on increase in trade. However, they may also be of a political nature – for example through preparing trading partners for negotiations on a more binding

and comprehensive trade agreement, such as the on-going negotiations on TTIP, which actually include the SPS area, i.e. NTBs in food trade. Thus, trade relations and interdependencies, but also political relations, matter with regard to the choice of governance instruments to facilitate trade. EU officials have stated that equivalence agreements may actually be motivated more by political will and political salience than economic gains (Veggeland 2006). Both political and economic gains may therefore motivate negotiations on equivalence agreements – based on the prospect of establishing closer economic relationships with a preferred country and on the desire to establish closer regulatory co-operation and dialogue more specifically. Political returns from establishing formal relationships with trading partners through regulatory dialogue and cooperation could thus be an extra incentive, and sometimes a prerequisite, for entering into negotiations on binding trade agreements (see also above). On the other side, close political relationship and strong interdependencies may actually work as a barrier against applying “hard” means to facilitate trade, such as dispute settlement. For example, for Norway (not a member of the EU), the threshold against filing WTO complaints against EU’s trade-restrictive measures seem to have been high for many years, due to their close economic and political relationship. Thus, *political salience and political will* matters with regard to decisions on governance instruments used in trade-facilitation and conflict-resolution.

Another important factor, which is relevant for how to approach conflicts on NTBs, is *level of development*, i.e. the infrastructure and regulatory capacity of the parties involved. The fact that the EU and the U.S. both have an advanced and sophisticated infrastructure in place, as well as solid regulatory capacity, allow them to choose between a broad spectre of trade facilitation tools in their trade relations. A high level of infrastructure and regulatory capacity is of utmost importance because many cooperative arrangements – such as equivalency agreements – demand mutual trust and confidence between regulatory systems. The involved parties need to verify and be assured that other regulatory systems can “deliver” on health protection.

The *design of political institutions and regulatory frameworks* is also relevant for how equivalence agreements work (Veggeland 2006). For example, the European Commission has experienced problems in its regulatory cooperation with the U.S. government because it has had to deal with a large number of U.S. agencies, each of which has an independent responsibility for a specific regulatory area. Each agency may furthermore have its own regulatory culture and views on the best way to regulate. The U.S. for its part has only to deal with the European Commission, but has nevertheless experienced problems because of the complicated political decision-making system in the EU. For example, when changes or amendments to agreements are needed, this demands a formal decision by the Council of the European Union and the European Parliament. Thus, organizational asymmetry and divergent

regulatory cultures may cause problems in negotiating and maintaining trade agreements.

The effectiveness of ‘hard’ and ‘soft’ governance as tools to ensure trade facilitation and conflict-resolution is thus conditioned by the countries and measures and concerns involved, and by the nature of the interests and preferences of these countries.

Table 7: The assumed effectiveness of hard and soft governance in conflict-resolution

		Strength of state preferences	
		Strong	Weak
Regulatory concerns	Primary (e.g. health)	<i>Soft governance effective</i>	<i>Either</i>
	Secondary (e.g. quality)	<i>Either</i>	<i>Hard governance effective</i>

Table 7 highlights the most favourable conditions under which either soft or hard governance is assumed to be effective in solving conflicts and facilitating trade. As can be deduced from the governance perspectives presented earlier, soft governance tools may be of particular relevance in situations where preferences are strong and fundamental interests are at stake. Empirically, we find many cases illustrating that soft governance mechanisms are being used when core national interests and fundamental concerns are involved – such as the EU’s use of the Open Method of Coordination (OMC) for collective learning in social and health policy, as well as the EU’s use of networks of deliberative forums in foreign policy coordination (Trubek and Trubek 2005: 343; Smith 2004:105). The ‘beef hormones case’ analysed in this paper illustrates that the availability of a strong and powerful dispute settlement mechanism (c.f. the WTO dispute settlement mechanism) is not enough to solve a conflict based on a clear divergence in preferences and concerns. Dispute settlement may thus be more effective in situations where preferences are relatively weak and less fundamental concerns are at stake. Soft governance tools however, may be more effective precisely in situations where the use of force to ensure compliance and conflict-resolution fails. The use of equivalence and MoU in the EU-U.S. regulatory cooperation is a good example of soft governance tools being used in the “shadow of hard conflicts”. Thus, in practise, both hard and soft governance are relevant in trade relations and policy-coordination and may be used interchangeably and/or supplementary to get out of ‘locked’ situations in cases of conflict. This is again illustrated by conflicts and disputes in the EU-U.S. trade relationships. These have been characterized by a combination of ‘hard governance’ through the filing of cases under the WTO’s dispute settlement procedures and the implementation of extensive retaliatory measures, and an established transatlantic partnership involving “soft governance

instruments” through regulatory dialogues, scientific meetings, and confidence-building arrangements such as the VEA and the MoU.

The two case-studies presented in this paper illustrate that there is no “walk-in-the-park” as to being assured that the choice of governance instrument used to solve a conflict on NTBs will achieve the intended effect in an effective way. In order to consider the possible effectiveness of hard and soft governance in conflict resolution on NTBs, it is necessary to analyse the preceding history of the conflicts, the conditions under which the conflicts arise, and to make an assessment of how fundamental the regulatory differences in practise are.

Concluding remarks

This paper has highlighted two different tools to solve conflicts on NTBs and thus to facilitate trade. Dispute settlement and equivalence agreements both have strengths and weaknesses in conflict resolution. WTO is said to have the strongest dispute settlement and compliance mechanisms of all international organizations. Still, in many cases – such as the “beef hormones” dispute – this is not necessarily enough to solve conflicts and ensure compliance with WTO rules. When fundamental concerns (including scientific opinions) are at stake and preferences are strong, the effectiveness of dispute settlement may be reduced. Establishing equivalence assessments can be a “softer” way of solving conflicts and facilitating trade while at the same time safeguarding fundamental concerns. However, such agreements may be resource-demanding to negotiate and remain and their success is moreover dependent on factors such as level of trade and development, types of regulatory frameworks, and degree of political salience and will. There are thus possibilities as well as constraints linked to both dispute settlement and equivalence. This study has revealed some of the relevant conditions that are important in order to achieve effective conflict-resolution through the use of these soft and hard governance instruments. However, there is need for more research on the variety of instruments that can be used to solve trade conflicts and facilitate trade while at the same time being able to safeguard legitimate concern such as health protection. Research on the available “toolbox of instruments” (c.f. WTO 2002b) should also shed light on the multi-level aspects of regulation: what are the consequences for regulatory governance of the shifting of regulatory authority from the national to the international level?

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Annex 1: Provisions on Equivalence and Dispute settlement in the SPS Agreement

Article 4

Equivalence

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.
2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

Article 11

Consultations and Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.
2. In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.
3. Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

Annex 2: The EU and the U.S. as complainants and respondents in WTO disputes under the SPS Agreement – status: 20.10.2014²⁴

Dispute	Complainant	Respondent	SPS	Subject	Status
DS 100	European Communities	United States	Art. 2, 3, 4, 5, 8	Measures affecting imports of poultry products	In consultation on 18 August 1997
DS 279	European Communities	India	Art. 2, 3, 5, 7, 8	Import restrictions maintained under the export and import policy 2002-2007	In consultations on 23 December 2002
DS 96	European Communities	India	Art. 2, 3, 5	Quantitative restrictions on imports of agricultural, textile and industrial products	Settled or terminated (withdraw, mutually agreed solution), 7 April 1998
DS 287	European Communities	Australia	Art. 2.2, 2.3, 3.3, 4.1, 5.1, 5.6, 5.7, 8, Annex C	Quarantine regime for imports	Settled or terminated (withdraw, mutually agreed solution), 9 March 2007
DS 475	European Union	Russian Federation	Art. 2.2, 2.3, 3.1, 3.2, 3.3, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 6.1, 6.2, 6.3, 7, 8, Annex B, Annex C	Measures on the importation of Live Pigs, Pork and other Pig Products from the European Union	Panel established, but not yet composed, 22 July 2014
DS 293	Argentina	European Communities	Art. 2, 2.2, 2.3, 5, 5.1, 5.2, 5.5, 5.6, 7, 8, 10, 10.1, Annex B, Annex C	Measures affecting the approval and marketing of Biotech products	Settled or terminated (withdraw, mutually agreed solution), 19 March 2010
DS 389	United States	European Communities	Art. 2.2, 5, 5.1, 5.2, 7, 8, Annex B, Annex	EC – poultry (US)	Panel established, but not yet composed, 19

²⁴ Source (viewed December 2014):

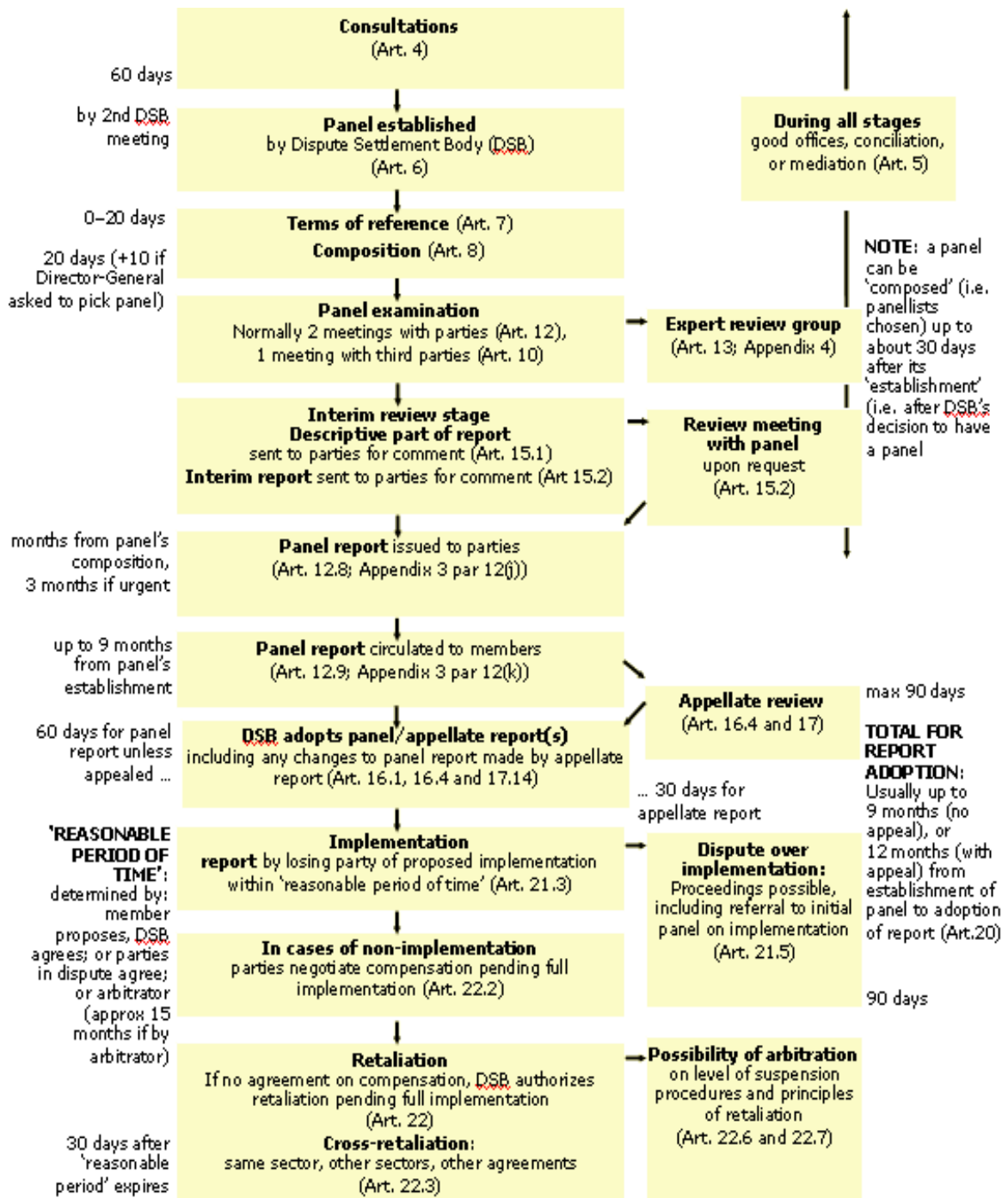
http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm?year=any&subject=none&agreement=A19&member1=*&member2=none&complainant1=true&complainant2=true&respondent1=true&respondent2=true&thirdparty1=true&thirdparty2=false#results

		ties	C		November 2009
DS 26	United States	European Communities	Art. 2, 3, 5	Measuring concerning Meat and meat products (hormones)	Mutually acceptable solution on implementation notified on 25 September 2009
DS 291	United States	European Communities	Art. 2, 2.2, 2.3, 5, 5.1, 5.2, 5.5, 5.6, 7, 8, Annex B, Annex C	Measures affecting the approval and marketing of biotech products	Authorization to retaliate requested (including 22.6 arbitration) on January 2008
DS 292	Canada	European Communities	Art. 2, 2.2, 2.3, 5, 5.1, 5.2, 5.5, 5.6, 7, 8, Annex B, Annex C	EC – Approval and marketing of biotech Products	Settled or terminated (withdraw, mutually agreed solution), 15 July 2009
DS 48	Canada	European Communities	Art. 2, 3, 5	Measuring concerning Meat and meat products (hormones)	Mutually acceptable solution on implementation notified on 17 March 2011
DS 135	Canada	European Communities	Art. 2, 3, 5	Measures affecting asbestos and products containing asbestos	Report(s) adopted, no further action required, 5 April 2001
DS 137	Canada	European Communities	Art. 2, 3, 4, 5, 6	Measures affecting imports of wood of conifers from Canada	In consultations on 17 June 1998
DS 134	India	European Communities	Art. 2	Restrictions on certain import duties on rice	In consultations on 27 May 1998
DS 389	United States	European Communities	Art. 2.2, 5, 5.1, 5.2, 7, 8, Annex B, Annex C	EC – poultry (US)	Panel established, but not yet composed, 19 November 2009
DS 26	United States	European Communities	Art. 2, 3, 5	Measuring concerning Meat and meat products (hormones)	Mutually acceptable solution on implementation notified on 25 September 2009
DS 291	United States	European Communities	Art. 2, 2.2, 2.3, 5, 5.1, 5.2, 5.5, 5.6, 7, 8, Annex B, Annex C	Measures affecting the approval and marketing of biotech products	Authorization to retaliate requested (including 22.6 arbitration) on January 2008
DS 3	United States	Republic of Korea	Art. 2, 5	Measures Concerning the Testing and Inspection of Agricultural Products	In consultations on 4 April 1995

DS 5	United States	Republic of Korea	Art. 2, 5	Measures Concerning the Shelf-Life of Products Complainant:	Settled or terminated (withdrawn, mutually agreed solution) on 20 July 1995
DS 21	United States	Australia	Art. 2, 5, 7, 8	Measures Affecting the Importation of Salmonids	Settled or terminated (withdrawn, mutually agreed solution) on 27 October 2000
DS 41	United States	Republic of Korea	Art. 2, 5, 8	Measures concerning Inspection of Agricultural Products	In consultations on 24 May 1996
DS 76	United States	Japan	Art. 2, 4, 5, 7, 8	Measures Affecting Agricultural Products	Mutually acceptable solution on implementation notified on 25 September 2001
DS 203	United States	Mexico	Art. 2, 2., 2.3, 3, 5.1, 5.6, 7, 8	Measures Affecting Trade in Live Swine	In consultations on 10 July 2000
DS 245	United States	Japan	Art. 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, 6.1, 6.2, 7, Annex B	Measures Affecting the Importation of Apples	Mutually acceptable solution on implementation notified on 30 August 2005
DS 430	United States	India	Art. 2, 2.2, 2.3, 3.1, 5, 5.1, 5.2, 5.5, 5.6, 5.7, 6, 6.1, 6.2, 7, Annex B	Measures Concerning the Importation of Certain Agricultural Products	Panel report under appeal on 26 January 2015
DS 144	Canada	Unites States	Art. 2, 3, 4, 5, 6, 13, Annex B, Annex C	Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada	In consultations on 25 September 1998
DS 384	Canada	Unites States	Art. 2, 5, 7	Certain Country of Origin Labeling (Cool) Requirements	Compliance proceedings ongoing on 25 September 2013
DS 100	European Communities	Unites States	Art. 2, 3, 4, 5, 8	Measures affecting imports of poultry products	In consultation on 18 August 1997
DS 386	Mexico	Unites States	Art. 2, 5, 7	Certain Country of Origin Labeling Requirements	Compliance proceedings ongoing on 25 September 2013
DS 392	China	Unites States	Art. 2.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6,	Certain Measures Affecting Imports	Report(s) adopted, no further action required on 25 October 2010

			5.7, 8	of Poultry from China	
DS 406	Indonesia	Unites States	Art. 2, 3, 5, 7	Measures Affecting the Production and Sale of Clove Cigarettes	Mutually acceptable solution on implementation notified on 3 October 2014
DS 447	Argentina	Unites States	Art. 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.4, 5.6, 6.1, 6.2, 8, 10.1, Annex 1c	Measures Affecting the Importation of Animals, Meat and Other Animal Products	Panel composed on 8 August 2013
DS 448	Argentina	Unites States	Art. 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.2, 5.4, 5.6, 7, Annex B, 8, Annex C, 10.1	Measures Affecting the Importation of Fresh Lemons	In consultations on 3 September 2012

Annex 3: The WTO Dispute Settlement Mechanism



Annex 4: Conditions of Parity in the VEA between the EU and the U.S – as of 2010²⁵

VEA Clause	Animal/ Public Health	Species/ Commodity	Equivalency		
			Parity	U.S.	E.U.
6. Fresh meat	Animal	equidae, porcine, animals	Mixed	Yes 1	Yes 2
		Ruminants	Equal	Yes 2	Yes 2
	Public	Ruminants, equidae, porcine, ovine, caprine	Equal	Yes 3	Yes 3
7. Poultry meat	Animal		Perfect	Yes 1	Yes 1
	Public		Equal	Yes 3	Yes 3
8. Meat products	Animal	Red meat (ruminants/ equidae)	Equal	Yes 2	Yes 2
		Pigs	Mixed	Yes 1	Yes 2
		Poultry	Mixed	Yes 1	Yes 2
		Wild and farmed game	Lopsided	Yes 2	NE
	Public	Ruminants, equidae, pigs, poultry	Equal	Yes 3	Yes 3
9. Farmed game meat	Animal	Deer	Lopsided	Yes 2	NE
		Rabbit	Lopsided	Yes	NE
				1	
		Porcine	Lopsided	Yes 1	NE
		Feathered	Lopsided	Yes 1	NE
11. Fisheries products for human consumption	Public	Fish/fisheries products	Lopsided	Yes 3	Yes 3/ Yes 1
13. Milk and milk-based products for human consumption	Animal	cattle, buffalo, sheep, goats	Equal	Yes 2	Yes 2
	Public	UHT-milk/sterilised milk	Equal	Yes 3	Yes 3
		Pasteurised products	Equal	Yes 3	Yes 3
		Not pasteurised (raw or thermised)	Equal	Yes 3	Yes 3
14. Milk and milk-based products not for human consumption	Animal	cattle, buffalo, sheep, goats	Lopsided	Yes 2	NE
		All pasteurised or UHT or sterilised	Lopsided	Yes 2	NE
15. Minced meat	Animal	Ruminants	Lopsided	Yes 2	NE
		Pigs	Lopsided	Yes 1	NE
	Public	Ruminants	Equal	Yes 3	Yes 3

²⁵ See USDA Foreign Agricultural Service (2010).

VEA Clause	Animal/ Public Health	Species/ Commodity	Equivalency		
			Parity	U.S.	E.U.
16. Meat preparations	Animal	Ruminants, equidae	Lopsided	Yes 2	NE
		Pigs	Lopsided	Yes 2	NE
		Poultry/wild game/farmed game	Lopsided	Yes 1	NE
	Public	Ruminants, equidae, pigs, poultry	Lopsided, Equal	Yes 2/ Yes 3	Yes 3
17. Animal casings for human consumption	Animal	cattle	Lopsided	Yes 2	NE
		Pigs	Lopsided	Yes 2	NE
		Sheep, goats	Lopsided	Yes 2	NE
18. Animal casings not for human consumption	Animal	Cattle	Lopsided	Yes 2	NE
		Pigs	Lopsided	Yes 2	NE
		Sheep, goats	Lopsided	Yes 2	NE
19. Hides and skins	Animal	Cattle, sheep, goats, pigs	Lopsided	Yes 1	E
20. Canned pet food containing high/low risk material		Containing mammalian material	Lopsided	Yes 2	E
		Containing only non-mammalian material	Lopsided	Yes 2	E
21. Canned pet food containing only low risk material		Containing mammalian material	Lopsided	Yes 2	E
		Containing only non-mammalian material	Lopsided	Yes 2	E
22. Dry and semi moist petfood containing only low risk material			Lopsided	Yes 2	E
23. Dry and semi moist petfood containing high/low risk material		Containing mammalian material	Lopsided	Yes 2	E
		Containing only non-mammalian material	Lopsided	Yes 1	E

VEA Clause	Animal/ Public Health	Species/ Commodity	Equivalency		
			Parity	U.S.	E.U.
24. Bones and bone products for human consumption	Animal	Fresh meat (ruminants, horses, pigs)	Lopsided	Yes 2	NE
		Farmed game: pigs, deer	Lopsided	Yes 2	NE
		Fresh meat: Poultry	Lopsided	Yes 1	NE
		Feathered, farmed, and wild game	Lopsided	Yes 1	NE
		Wild game: pigs, deer	Lopsided	Yes 2	NE
25. Bones, horns, and hooves and their products not for human consumption	Animal		Lopsided	Yes 1	NE
26. Processed animal protein for human consumption	Animal	Fresh meat (ruminants, equidae, pigs)	Lopsided	Yes 2	NE
		Farmed game: pigs, deer	Lopsided	Yes 2	NE
		Fresh meat: Poultry	Lopsided	Yes 1	NE
		Feathered, farmed, and wild game	Lopsided	Yes 1	NE
27. Processed animal protein not for human consumption	Containing material of mammalian origin	Ruminants	Lopsided	Yes 2	NE
		Non-ruminants	Lopsided	Yes 3	NE

	Containing material of non-mammalian origin	Poultry and fish	Lopsided	Yes 1	NE
		Non-ruminants	Lopsided	Yes 1	NE
29. Blood and blood products intended for human consumption	Animal	Farmed game: pigs, deer	Lopsided	Yes 2	NE
		Fresh meat: Poultry	Lopsided	Yes 1	NE
		Feathered farmed and wild game	Lopsided	Yes 1	NE
		Wild game: pigs, deer	Lopsided	Yes 1	NE
30. Blood and blood products not intended for human consumption	Animal		Equal	Yes 2	Yes 2

VEA Clause	Animal/ Public Health	Species/ Commodity	Equivalency		
			Parity	U.S.	E.U.
31. Lard and rendered fats intended for human consumption	Animal	Fresh meat: ruminants, horses, pigs	Lopsided	Yes 2	NE
		Farmed game: pigs, deer	Lopsided	Yes 2	NE
		Fresh meat: poultry	Lopsided	Yes 1	NE
		Feathered farmed and wild game	Lopsided	Yes 1	NE
		Wild game: pigs, deer	Lopsided	Yes 2	NE
32. Lard and rendered fats not intended for human consumption			Lopsided	Yes 2	NE
33. Raw material for feeding stuffs, pharmaceutical or technical use	Animal		Lopsided	Yes 1	NE
35. Game trophies	Animal		Lopsided	Yes 1	NE
37. Wool, feathers and hair	Animal	Wool	Lopsided	Yes 1	NE
		Pig bristles	Lopsided	Yes 1	NE

41. Egg products for human consumption	Animal		Lopsided	Yes 2	Yes 1
42. Shell eggs	Animal		Lopsided	Yes 1	Yes 2

Annex 5: EU-US TTIP Negotiations. TEXTUAL PROPOSAL - SANITARY AND PHYTOSANITARY MEASURES (SPS)²⁶

This **TEXTUAL PROPOSAL** is the European Union's initial proposal for legal text on "Sanitary and Phytosanitary Measures (SPS)" in TTIP. It was tabled for discussion with the US in the negotiating round of (29 September-3 October 2014) and made public on 7 January 2015. The actual text in the final agreement will be a result of negotiations between the EU and US.

Article 1

Scope and coverage

This Chapter applies to all SPS measures that may, directly or indirectly, affect trade between the Parties.

This Chapter shall also apply to collaboration on animal welfare matters.

Article 2

Objectives. The objectives of this chapter are to:

1. Facilitate trade between the Parties to the greatest extent possible while preserving each Party's right to protect human, animal or plant life and health in its territory and respecting each Party's regulatory systems, risk assessment, risk management and policy development processes;
2. Ensure that the Parties' sanitary and phytosanitary (SPS) measures do not create unnecessary barriers to trade;
3. Further the implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (WTO SPS Agreement);
4. Build upon and extend the scope of the Veterinary Agreement which is fully integrated in this Chapter;
5. Improve communication and cooperation on sanitary and phytosanitary measures between the Parties;
6. Improve consistency, predictability and transparency of each Party's SPS measures;

²⁶ Downloaded from the website of the European Commission's DG Trade, March 10, 2015: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf

7. Provide a framework for dialogue and cooperation with a view to enhancing the protection and welfare of animals and reaching a common understanding concerning animal welfare standards.

Article 3

Rights and obligations

Nothing in this Chapter shall limit the rights or obligations of the Parties under the Agreement establishing the World Trade Organisation and its Annexes. The Parties shall avail themselves of the necessary resources to effectively implement this Chapter.

Article 4

Definitions

For the purpose of this Chapter, “Protected Zone” for a specified regulated organism of phytosanitary concern means an officially defined geographical area in the EU in which that organism is not established as demonstrated by annual surveys, in spite of favourable conditions and its presence in other parts of the Union; The “SPS Agreement” means the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures. The definitions in Annex A of the SPS Agreement apply, as well as those of Codex Alimentarius (Codex), the World Organisation for Animal Health (OIE) and the International Plant Protection Convention (IPPC). In the event of an inconsistency between the definitions adopted by Codex, or the OIE, the IPPC and the definitions set out in the WTO SPS Agreement, the definitions set out in the WTO SPS Agreement shall prevail.

Article 5

Competent Authorities

For the purpose of this Chapter, the competent authorities of each Party are those listed in [Annex 2]. The Parties shall inform each other of any change of these competent authorities.

Article 6

Application of SPS measures

Except as provided for in Article 10 [Adaptation to regional conditions] each Party shall apply its sanitary or phytosanitary import conditions to the entire territory of the other Party. Where harmonised import conditions exist in one Party, these conditions shall apply to the entire territory of the exporting Party. Without prejudice to Article 10 [Adaptation to regional conditions] each Party shall ensure that products which are in conformity with these import conditions can be placed on the market and used in its entire territory on the basis of a single authorisation, approval or certificate.

*Article 7***Trade facilitation/conditions****Sanitary and phytosanitary import procedures**

1. Sanitary and phytosanitary procedures shall be established with the objective to minimise negative trade effects and to simplify and expedite the approval and clearance process while ensuring the fulfilment of the importing Party's requirements.
2. The Parties shall ensure that all sanitary and phytosanitary procedures affecting trade between the parties are undertaken and completed without undue delay and that they are not applied in a manner which would constitute an arbitrary or unjustifiable discrimination against the other Party.

General sanitary and phytosanitary import requirements

3. The importing Party shall make available information about sanitary and phytosanitary import requirements and conditions and about the import authorisation process, including complete details about the mandatory administrative steps, expected time-lines, and authorities in charge of receiving import applications and of processing them.
4. In accordance with applicable standards agreed under the International Plant Protection Convention (IPPC) the Parties undertake to maintain adequate information on their pest status (including surveillance, eradication and containment programmes and their results) in order to support the categorization of pests and to justify import phytosanitary measures.
5. The Parties shall establish lists of regulated pests for commodities where a phytosanitary concern exists. The list shall contain:
 - a) the pests not known to occur within any part of its own territory;
 - b) the pests known to occur within any part of its own territory and under official control;
 - c) the pests known to occur within any part of its own territory, under official control and for which pest free areas are established.
6. For commodities for which a phytosanitary concern exists, import requirements shall be limited to measures ensuring the absence of regulated pests of the importing Party. Such import requirements shall be applicable to the entire territory of the exporting Party.

Specific sanitary and phytosanitary import requirements

7. The Parties shall ensure that tolerances and maximum residue levels adopted by the Codex Alimentarius Commission after the entry into force of this Agreement will be applied by each Party without undue delay unless the importing Party had signalled a

reservation in the Codex Alimentarius Commission. Such tolerances and maximum residue levels, shall apply between the Parties within 12 months after their adoption.

8. Where it is necessary to establish specific import requirements, such as model certificates, the importing Party shall take the necessary legislative and administrative steps to allow trade to take place without undue delay and normally within one year. In order to establish specific import requirements, the exporting Party shall, upon request of the importing Party:

- a) provide all relevant information required by the importing Party; and
- b) give reasonable access to the importing Party for inspection, testing, audit and other relevant procedures.

9. The importing Party shall make available a list of commodities for which it is required to conduct a Pest Risk Analysis prior to the authorisation of imports. Pest risk analyses shall be carried out as promptly as possible and normally within one year of a request being made.

10. Where a range of alternative sanitary or phytosanitary measures may be available to attain the appropriate level of protection of the importing Party, the Parties shall, upon request of the exporting Party, establish a technical dialogue with a view to selecting the most practicable and least trade-restrictive solution.

Trade facilitation

11. Where it is necessary for the importation of a product that an establishment or facility be included on a list by the importing Party, the importing Party shall approve such establishments or facilities which are situated on the territory of the exporting Party within [one month] and without prior inspection of individual establishments or facilities if:

- a) the exporting Party has requested such an approval for a given establishment or facility, accompanied by the appropriate guarantees, and
- b) the conditions and procedures set out in [Annex VI] are fulfilled.

The importing Party shall make its lists publicly available.

12. Without prejudice to existing arrangements at the time of entry into force of this Agreement and unless the Parties agree otherwise, consignments of regulated commodities shall be accepted on the basis of adequate guarantees by the exporting Party, without:

- a) Pre-clearance programmes. Control activities at the country of origin performed by the NPPO of the country of destination should not be applied as a permanent import measure and only foreseen to facilitate **new** trade. On a voluntary basis, the NPPO of the country of origin may request pre-clearance within the inspection activities carried out by the importing countries as a trade facilitation tool;

- b) Import licences or import permits;
- c) Phytosanitary protocols or work plans prescribed by the importing party.

13. Each Party shall ensure that products exported to the other Party meet the appropriate level of protection of the importing Party. The responsibility for the implementation of adequate control measures and inspections lies with the exporting Party. The importing Party may require that the relevant competent authority of the exporting Party objectively demonstrate, to the satisfaction of the importing Party, that the import requirements are fulfilled.

Article 8

Elimination of redundant control measures

1. The Parties recognise each other's competent authorities as responsible to ensure that establishments, facilities and products eligible for exports meet the applicable sanitary or phytosanitary requirements of the importing Party.
2. The importing Party shall accept establishments or facilities that were authorised and listed by the exporting Party without re-inspection, third party certification or any other, additional guarantees.

Article 9

Equivalence

1. The importing Party shall accept sanitary and phytosanitary measures of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of protection.
2. Equivalence may be recognised in relation to an individual measure and/or groups of measures and/or systems applicable to a sector or part of a sector. For the determination, recognition and maintenance of equivalence the Parties shall follow the principles set out in the available guidance of international standard setting bodies¹ recognised by the WTO SPS Agreement, as well as in the provisions of [Annex IV], where applicable.
3. The final determination whether a sanitary measure maintained by an exporting Party achieves the importing Party's appropriate level of sanitary protection rests solely with the importing Party acting in accordance with its administrative and legislative framework.
4. Where the importing Party has concluded a positive equivalence determination, the importing Party shall take the necessary legislative and/or administrative measures to implement it without undue delay and normally within six months.

Internationally agreed guidelines include, but are not limited to Guidelines of Codex Alimentarius on the Judgement of Equivalence of Sanitary Measures associated with Food Inspection and Certification Systems CAC/GL 53-2003; International Standard for

Phytosanitary Measures ISPM 24 Guidelines for the determination and recognition of equivalence of phytosanitary measures.

5. If necessary and objectively justified, the Parties may identify special conditions which, in combination with the exporting Party's measures, will achieve the importing Party's appropriate level of protection.

6. [Annex V] sets out:

a) The areas for which the importing Party recognises that the measures of the exporting Party are equivalent to its own, and

b) The areas for which the importing Party recognises that the fulfilment of the specified special conditions, combined with the exporting Party's measures, achieve the importing Party's appropriate level of protection.

7. The Parties may agree on simplified sanitary or phytosanitary certificates for products for which equivalence has been recognised.

Article 10

Adaptation to regional conditions

Animals, animal products and animal by-products

1. The Parties recognise the principle of zoning which they agree to apply in their trade.

2. The importing Party shall recognise the health status of zones, as determined by the exporting Party, with respect to the animal and aquaculture diseases specified in [Annex II].

3. Without prejudice to Article 16 [Emergency measures] the importing Party shall recognise zoning decisions taken by the exporting Party in accordance with the criteria set out in [Annex III] where an area is affected by one or more of the diseases listed in [Annex II].

4. The exporting Party shall, if requested by the importing Party, provide full explanation and supporting data for the determinations and decisions covered by this Article and may request technical consultations in accordance with Article 15 [Technical consultation]. The importing Party shall assess the information within 15 working days following receipt. Any verification the importing party may request shall be carried out in accordance with Article 11 [Audit and verification] and within 25 working days following receipt of the request for verification. The Parties shall endeavour to avoid unnecessary disruption to trade.

5. Where a Party considers that a specific region has a special status with respect to a specific disease other than those in [Annex II] and which fulfils the criteria laid down in the OIE Terrestrial Code Chapter 1.2, it may request recognition of this status. . The importing Party may also request additional guarantees in respect of imports of live

animals and animal products appropriate to the agreed status. The guarantees for specific diseases are specified in [Annex IV].

6. The Parties also recognise the concept of compartmentalisation and agree to cooperate on this matter.

Plants and plant products

7. Without prejudice to Article 16 [Emergency measures] each Party shall recognize the phytosanitary status of the exporting Party as determined by the exporting Party in accordance with the following provisions:

a) The Parties recognize the concepts of Pest Free Areas, Pest Free Places of Production and Pest Free Production Sites, as well as areas of low pest prevalence as specified in relevant FAO/IPPC International Standards for Phytosanitary Measures (ISPM), and of Protected Zones according to Council Directive 2000/29/EC, which they agree to apply in their trade.

b) When establishing or maintaining phytosanitary measures, the importing Party shall take into account pest free areas, pest free places of production, pest free production sites, areas of low pest prevalence, as well as protected zones established by the exporting Party.

c) The exporting Party shall identify Pest Free Areas, Pest Free Places of Production, Pest Free Production Sites, Protected Zones or areas of low pest prevalence to the other Party and, upon request, provide a full explanation and supporting data as provided for in the relevant ISPMs or otherwise deemed appropriate. Unless the importing Party raises an objection and requests consultations within 90 days, the regionalization decision so notified shall be understood as accepted.

d) Consultations referred to in subparagraph (c) shall take place in accordance with Article 15 [Technical consultations]. The importing Party shall assess additional information requested within 90 days after receipt. Any verification the importing party may request shall be carried out in accordance with [Article 11 Audit and verification] and within 12 months following receipt of the request for verification, taking into account the biology of the pest and the crop concerned.

Article 11

Audit and verification

1. In order to maintain confidence in the effective implementation of the provisions of this Chapter, each Party has the right to carry out an audit or verification, or both, of all or part of the other Party's control system. Audits shall follow a systems based approach which relies on the examination of a sample of system procedures, documents or records and, where required, a selection of sites.

2. The nature and frequency of audits and verifications shall be determined by the importing Party taking into account the inherent risks of the product the track record of

past import checks and other available information, such as audits and inspections undertaken by the competent authority of the exporting party.

3. For the purpose of paragraph 1, the importing Part shall endeavour to rely on audits and verifications undertaken by the competent authority of the exporting Party.

4. Audits and verifications shall be conducted in accordance with [Annex VII] and in line with internationally agreed Guidelines².

5. Verification procedures may include, but are not limited to:

a) an assessment of all or part of the exporting Party's total control programme, including, where appropriate, reviews of the exporting Party's inspection and audit programmes, and

b) on-site checks and inspections of a selection of sites within the scope of the audit.

6. For the European Union, the European Commission will carry out the verification procedures provided for in paragraph 1. The US agencies identified in [Annex I] shall facilitate the performance of these verification procedures by the Commission.

7. The US agencies identified in Annex I will carry out the verification procedures provided for in paragraph 1 for the US. The European Union shall facilitate the performance of these verification procedures by those agencies.

8. Any measures taken as a consequence of audits and verifications shall be proportionate to risks identified. If so requested, technical consultations regarding the situation shall be held in accordance with [Article 15 Technical Consultation]. The Parties shall consider any information provided through such consultations.

9. Either Party may publish the results and conclusions of its verification procedures.

10. Each Party shall bear its own costs associated with the audit or verification.

Internationally agreed guidelines include, but are not limited to Codex Guidance document for the design, operation, assessment and accreditation of food import and export inspection and certification systems (CAC/GL 26-1997); International Standards for Phytosanitary Measures ISPM 20: Guidelines for a phytosanitary import regulatory system.

Article 12

Export certificates

1. When a party requires an export certificate for the importation of a product, this shall be based on the principles laid down in the international standards of the Codex Alimentarius, the IPPC and the OIE.

2. In respect of certification of plants, plant products and regulated commodities, the competent authorities shall apply the principles laid down in the FAO International

Standards for Phytosanitary Measures No 7 "Export Certification System" and No 12 "Guidelines for Phytosanitary Certificates".

3. When an official health certificate is required for the importation of a consignment of live animals or animal products and if the importing Party has accepted the measures of the exporting Party as equivalent to its own, the Parties shall use simplified model health attestations prescribed in [Annex VIII], unless the Parties jointly decide otherwise. The Parties may also define model attestations for other products if they so jointly decide in accordance with [Article 18 Joint Management Committee].

4. Original certificates or other original documents may either be transmitted by mail or by secure methods of electronic data transmission that offer equivalent certification guarantees. The Parties shall cooperate in the implementation of electronic certification procedures in accordance with the provisions described in [Annex VIII].

Article 13

Import checks and fees

1. [Annex IX] sets out principles and guidelines for import checks and fees, including the frequency rate for import checks.

2. In the event that import checks reveal non-compliance with the relevant import requirements, the action taken by the importing Party shall be based on an assessment of the risk involved, and shall ensure that such measures are not more trade-restrictive than necessary to achieve the Party's appropriate level of sanitary or phytosanitary protection.

3. The importer of a non-compliant consignment, or its representative, and, on demand the competent authorities of the exporting Party shall be notified of the reason for non-compliance, and be provided the opportunity to contribute relevant information to assist the importing Party in taking a final decision.

4. Where the consignment is accompanied by a certificate, the importing Party shall inform the competent authority of the exporting Party in case of a rejection and provide all appropriate information, including detailed laboratory results and methods. In the case of pest interceptions, the notification should indicate the pest at the species level.

5. Upon request, in the case of an interception of regulated pests, the exporting Party shall provide information about monitoring and possible mitigation measures undertaken.

6. Any fees imposed for the procedures on imported products from the exporting Party shall not be higher than the actual cost of the service.

7. Inspections carried out in accordance with [Article 7(130 Preclearance)] shall only be conducted in exceptional cases and with the understanding that they are temporary measures to build confidence. Fees and other costs of such inspections shall be borne by the importing party.

*Article 14***Transparency Notification:**

1. Each Party shall notify the other Party without undue delay of:
 - a) Significant changes in pest/disease status, such as the presence and evolution of diseases in [Annex II Process of Recognition of Regional Conditions];
 - b) changes in their respective sanitary or phytosanitary measures;
 - c) findings of epidemiological importance with respect to animal diseases, which are not in Annex II; or which are new diseases;
 - d) significant food safety issues relating to products traded between the Parties; and
 - e) any significant changes to the structure and organisation of their competent authorities.

Information exchange:

2. The Parties will endeavour to exchange information on other relevant issues including:
 - a) on request, the results of a Party's official controls and a report concerning the results of the controls carried out;
 - b) the results of import checks provided for in Article 13[Import checks and fees]in case of rejected or non-compliant consignments of products;
 - c) on request, risk analyses and scientific opinions, relevant to this Chapter and produced under the responsibility of a Party.
3. Unless otherwise decided by the Committee referred to in Article 18 [Joint management committee], when the information referred to in paragraph 1 or 2 has been made available via notification to the WTO or relevant international standard setting body in accordance with the relevant rules, the requirements in paragraphs 1 and 2 as they apply to that information are fulfilled.

*Article 15***Technical consultation**

Where a Party has significant concerns regarding food safety, plant health, or animal health, or regarding a measure proposed or implemented by the other Party, that Party can request technical consultations. The other Party should respond to such a request without undue delay and normally within 15 days. Each Party shall endeavour to provide all relevant information necessary to avoid unnecessary disruption to trade and to reach a mutually acceptable solution. Consultations may be held by audio- or video conference.

*Article 16***Emergency measures**

1. The importing Party may, on serious grounds, provisionally take emergency measures necessary for the protection of human, animal or plant health.
2. Emergency measures shall be notified to the other Party within 24 hours after the decision to implement them and, on request, technical consultations regarding the situation shall be held in accordance with Article 15 [Technical consultation]. The Parties shall consider the information provided through such consultations.
3. The importing Party shall:
 - a) Consider information provided, by the exporting Party when making decisions with respect to consignments that, at the time of adoption of emergency measures, are being transported between the Parties;
 - b) Consider the most suitable and proportionate solution for consignments in transport between the Parties, in order to avoid unnecessary disruptions to trade and
 - c) Revise or repeal, without undue delay, the emergency measures or replace them by permanent measures with a view to avoid unnecessary trade disruption.

*Article 17***Animal welfare**

1. The Parties recognise that animals are sentient beings. They undertake to respect trade conditions for live animals and animal products that are aimed to protect their welfare.
2. The Parties undertake to exchange information, expertise and experiences in the field of animal welfare with the aim to align regulatory standards related to breeding, holding, handling, transportation and slaughter of farm animals.
3. The Parties will strengthen their research collaboration in the area of animal welfare to develop adequate and science-based animal welfare standards related to animal breeding and the treatment of animals on the farm, during transport and at slaughter.
4. In accordance with Article 19 [Collaboration in international fora (multilateral and bilateral)] the Parties undertake to collaborate in international fora with the aim to promote the further development of good animal welfare practices and their implementation.
5. The Committee described in Article [18 Joint management committee] may appoint a working group to implement this provision.

*Article 18***Joint management committee**

1. The Parties hereby establish a Joint Management Committee (JMC) for SPS Measures, hereafter called the Committee, comprising regulatory and trade representatives of each Party who have responsibility for SPS measures.

2. The functions of the Committee include:

a) To monitor the implementation of this Chapter and to consider any matter relating to this Chapter, and to examine all matters which may arise in relation to its implementation;

b) To provide direction for the identification, prioritization, management and resolution of issues;

c) To address any requests by the Parties for the modification of import checks;

d) To review the Annexes to this Agreement;

e) To provide a regular forum for exchanging information relating to each Party's regulatory system, including the scientific basis;

f) To prepare and maintain a document detailing the state of discussions between the Parties on their work on recognition of the equivalence of specific SPS measures.

3. In addition, the Committee may, inter alia:

a) identify opportunities for greater bilateral engagement, including enhanced relationships, which may include exchanges of officials;

b) discuss at an early stage, changes to, or proposed changes to, measures being considered;

c) facilitate improved understanding between Parties related to the implementation of the WTO SPS Agreement, promoting cooperation between Parties on SPS issues under discussion in multilateral fora, including the WTO SPS Committee and international standard-setting bodies, as appropriate;

d) identify and discuss, at an early stage, initiatives that have an SPS component and would benefit from cooperation.

4. The Committee may establish working groups consisting of expert-level representatives of the Parties, to address specific SPS issues. When additional expertise is needed, participants from non-governmental organisations may be included, with the agreement of the parties.

5. A Party may refer any SPS issue to the Committee. The Committee should consider any matter referred to it as expeditiously as possible.

6. [In the event that the Committee is unable to resolve an issue expeditiously, the Committee shall, upon request of a Party, report promptly to the [TTIP Oversight Body]. Pending outcome of institutional chapter]

7. Unless the Parties otherwise agree, the Committee shall meet and establish its work programme no later than six months following the entry into force of this Agreement, and its rules of procedure no later than one year after the entry into force of this Agreement.

8. Following its initial meeting, the Committee shall meet as required, normally on an annual basis. If agreed by the Parties, a meeting of the Committee may be held by video-conference or teleconference. The Committee may also address issues out of session by correspondence.

9. The Committee shall report annually on its activities and work programme to the [TTIP Oversight Body]. **Pending outcome of institutional chapter]**

10. Upon entry into force of this Agreement, each Party shall designate and inform the other Party of a Contact Point to coordinate the Committee's agenda and to facilitate communications on SPS matters.

Article 19

Collaboration in international fora (multilateral and bilateral)

The Parties will collaborate in the international standard setting bodies (OIE, Codex Alimentarius, IPPC, etc.), with a view to reaching mutually satisfactory outcomes.

Article 20

Recognition and termination of the Veterinary Agreement

The Parties recognise the achievements that have been accomplished under the Agreement between the European Community and the Government of the United States of America on sanitary measures to protect public and animal health in respect of trade in live animals and animal products (the Veterinary Agreement) and confirm their intention to continue this work under the framework of this Agreement. [This Veterinary Agreement of 21 April 1998, as amended, is terminated from the date of entry into



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