

**REGULATORY CONFLICTS THAT LEAD TO TRADE DISPUTES:
IMPORTANT, BUT ARE THEY RESOLVABLE?**

Linda R. Horton, Partner, Hogan & Hartson LLP

I. SPS ISSUES ARE BECOME INCREASINGLY PREVALENT TODAY, LEADING TO AN UPTICK IN WTO CASES AND TRADE IRRITANTS

- A. Concerns over food safety and the lack of international food standards has caused an increase in trade restrictive measures. Many of these are motivated by substantial and justified concerns about product safety, while others may be attributable to prejudice against foreign-sourced products, or even economic concerns in the current recession.
- B. Ongoing WTO cases include *EC – Beef Hormones*, the *EC – Poultry Import Restrictions* consultations requested by the United States in January 2009, and the recently announced *US – Poultry Ban* consultations requested by China.
- C. Other recent SPS issues include China’s tainted milk scandal in 2008, a pending WTO case against EC poultry restrictions by the United States, and a variety of measures imposed by Russia and China ostensibly due to the recent “pig flu.”

II. SPS ISSUES ARE COMPLICATED AND LONG-LASTING – EXAMPLE IS EC – BEEF HORMONES

- A. Lengthy WTO proceedings, now more than a decade without resolution.
- B. Intensive EC compliance procedures, which included the gathering of additional evidence and arguments about whether “new science” has yielded different results.
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III. WTO AND DOMESTIC REGULATORY ISSUES: A FORMER REGULATOR’S PERSPECTIVE

- A. Standard of review/burden of proof
- B. Overview of the FDA regulatory system –gathering of evidence, the internal decision-making process, stakeholder involvement, transparency, judicial review.
- C. Assessment of the scientific evidence
 1. U.S. administrative law includes the notion that the administrative agency should be the finder of fact.
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D. Deference-worthiness of measure or regulation:

Can principles from US administrative law of

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E. Under the TBT agreement, technical regulations must be notified to the WTO.

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