der IET/822/2012 and under the Renewable Energy Directive. Unless the EU can prove that Argentina's biodiesels are, in fact, not "*like*" EU biodiesels, they may not be treated less favourably on the basis of the environmental effects connected to their production processes. Consequently, Article III:4 of the GATT will provide a powerful shield to prevent Spain from discriminating against Argentina's (or any other imported) biodiesel in favour of the EU production of the "*like*" biofuel.

V. Conclusions

The concerns raised by Argentina with regard to Spain's Ministerial Order IET/822/2012 highlight the increasing frictions between multilateral trade and environmental measures. When such frictions occur, the WTO is the appropriate *forum* for tackling these trade concerns.

Argentina's concerns focus on the allegedly discriminatory and trade-restrictive nature of the measure imposed by Spain, which *de facto* singles out Argentina's exports of biodiesel. In fact, some argue that Spain's Ministerial Order IET/822/2012 was taken in order to retaliate against Argentina's move to nationalise Spanish Repsol's stakes in Yacimientos Petroliferos Fiscales, an oil company. According to Argentina, the Spanish measure cannot be considered as environmental in nature (that is, even if it implements the requirements under the Renewable Energy Directive) and, as a result, it constitutes a disguised measure adopted in order to target and penalise Argentina's biodiesel industry.

The sustainability requirements under the Renewable Energy Directive (and the Fuel Quality Directive,[6] which contains corresponding sustainability criteria for biofuels used for road vehicles) are likely to pose concerns among exporters to the EU and result in WTO dispute settlement. A WTO complaint lodged against Spain's measure may call on the WTO to decide whether the EU sustainability criteria, as applied by Spain in the case at stake, are arbitrary in nature, discriminatory, unnecessarily cumbersome, scientifically unjustified and, ultimately, disguised restrictions on trade. In that perspective, it is perhaps a pity that Argentina's request for consultations has left out the arguments on the alleged violation of certain obligations under the TBT Agreement. These arguments may still be made in the request for the establishment of a panel, if the case is not settled during consultations and Argentina decides to commence panel proceedings.

Environmental protection and the pursuit of sustainable production practices are legitimate and sacrosanct objectives, which are recognised by the WTO and should be pursued through multilateral instruments, but they must not become intentional or unintentional forms of protection or trade distortion and should always be based on the least trade restrictive measures available. Governments and stakeholders must work together to identify these measures, if necessary through flexible and creative policy-making, and ensure that neither the environment nor world trade become victims to their unilateral approaches.

6 Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC (OJ L 350, 28.12.1998, p. 58), last amended by Commission Directive 2011/63/EU of 1 June 2011 amending, for the purpose of its adaptation to technical progress, Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels, OJ L 147, 2.6.2011, p. 15.

The Ractopamine Dispute in the Codex Alimentarius Commission

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The dispute over ractopamine in the Codex Alimentarius Commission (CAC) exemplifies changes in Codex proceedings. In its early days, the CAC resembled to an honourable Club of senior food safety officials aiming at setting food standards in a consensual manner. However, with the WTO connexion established in 1995, CAC proceedings are overshadowed by looming trade disputes and increasingly decided by majority voting. The tendency towards majority voting in the CAC may ultimately undermine the universality of food safety standards and the legitimacy of the CAC as an international standard setting body.

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I. The Codex Alimentarius

International food trade is nothing new. Already in the 19th century, colonial powers like Great Britain supplied the need of a growing urban population by importing meat and dairy products from their colonies, *e.g.* Australia and New Zealand. After World War II, international food trade further increased, following global economic recovery and upswing. However, the internationalisation of food chains and increased cross-border trade in food products also required international rules and standards. Without harmonisation, different national food standards may pose an obstacle to international food trade. Furthermore, the *Green Revolution*, that is, large-scale application of fertilisers and pesticides in agricultural production, started to feature negative side effects and caused anxiety among consumers. On these grounds, in the 1960s, the Food and Agricultural Organisation (FAO) and the World Health Organisation (WHO) of the United Nations embarked on a Joint FAO/WHO Food Standards Programme with the double objective of protecting the health of the consumers and to ensure fair practices in the food trade. For implementing the programme, FAO and WHO established the Codex Alimentarius Commission (CAC) which held its first session in Rome in October 1963. In everyday language, the term *Codex Alimentarius* or, even shorter, *the Codex* may refer either to the standards and rules established by the CAC or to the CAC itself.

II. The WTO Connexion

Initially, Codex standards were voluntary standards. Member countries were basically free whether to follow the standards established by the CAC or not. However, and maybe just because compliance was voluntary, Codex standards were usually adopted by consensus. Hence, in a basic document entitled *Rules of Procedure of the Codex Alimentarius Commission*, it is stated that the "Commission shall make every effort to reach agreement on the adoption or amendment of standards by consensus".[1] Because in these early days, proceedings in the Codex were conducted by honourable senior officials from national food safety authorities now deliberating at the international level in a quasi-scientific manner and finally adopting standards by consensus, the CAC was sometimes also referred to as a "Gentlemen's Club".

However, the entry into force of the agreements of the World Trade Organisation (WTO) in 1995 also marked the end of consensual debate in a gentlemanly atmosphere in CAC proceedings. The reason for the shift from consensus towards controversy is a specific agreement of the WTO, namely the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement). In fact, the SPS Agreement established a connexion between Codex standards, on the one hand, and the right of WTO member states to introduce or maintain sanitary and phytosanitary measures, on the other hand. The mechanism for establishing such a connexion is a legal presumption contained in article 3.2 of the SPS Agreement declaring that sanitary and phytosanitary measures which conform to international standards such as Codex standards are presumed to be consistent with WTO law. The legal presumption of WTO consistency of sanitary and phytosanitary measures conforming to international standards has, however, a major drawback. That drawback is expressed by the requirement for additional scientific justification for any sanitary or phytosanitary measures *not* conforming to international standards (article 3.3. of the SPS Agreement). Because relevant case law shows that additional scientific justification is hard to produce, WTO members are anxious to avoid inconformity with international, that is, Codex standards. For this very reason, standard setting proceedings in the CAC are no longer consensual debates among distinguished senior food safety officials, but became the floor for anticipated trade conflicts. A current example of a looming trade conflict anticipated in the CAC is the dispute over ractopamine and other growth promoters applied in stockbreeding.

III. Ractopamine Divides the World

Ractopamine is a feed additive used as growth promoter in pig breeding. Chemically, it is a beta-adrenergic agonist acting upon the beta receptors. Regulation of ractopamine has divided the world. On the one hand, there are regulators in countries such as the United States, Brazil, Mexico, Canada, Japan,

1 See Procedural Manual of the Codex Alimentarius Commission, 20th edition 2011, Section I, Basic texts and definitions, Rules of Procedure of the Codex Alimentarius Commission, Rule XII.2, available on the Internet at <ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_20e.pdf> (last accessed on 1 November 2012).

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South Korea and many others concluding that ractopamine, if used according to good veterinary practice, is safe. On the other hand, a block of countries of similar size, including China, Taiwan, the Russian Federation, the European Union, India, Turkey and Kenya, has banned the use of ractopamine in piggery. The regulatory divide regarding the question whether ractopamine is safe or not is reflected in proceedings of the CAC.[2]

The work of the CAC and its committees is nurtured with scientific expertise provided by scientific expert bodies. The scientific expert body responsible for assessing ractopamine was the Joint FAO/WHO Expert Committee on Food Additives (JECFA). For ractopamine, JECFA established Maximum Residue Limits (MRLs), a procedure implying that ractopamine, if used within the limits of established MRLs, is safe. On this scientific basis, the CAC started work for establishing a standard for ractopamine.

In 2003, the CAC mandated the Codex Committee on Residues of Veterinary Drugs in Foods (CCRVDF) to elaborate a draft standard for ractopamine. However, during its 31st session in 2008, the CAC noted that the draft standard for ractopamine got stuck at the final stage of the standard setting procedure, that is, at step 8. At step 8, draft standards are submitted to the CAC for adoption as international standards. Since then, many meetings of the CAC and its committees were challenged by the issue of ractopamine.

IV. From Consensus to Majority Voting

During the 32st session of the CAC in 2009, the EU, China and other countries suggested to relegate the draft standard for ractopamine to step 6 of the standard setting procedure. At step 6, the Codex Secretariat submits draft standards for consultation. China submitted that JECFA should re-examine ractopamine on the basis of new data derived from studies focusing on entrails consumption. In particular, China suggested reconsidering linkages between high consumption of pig entrails and ractopamine treatment.

On the occasion of the 34th session of the CAC in 2011, the US tried to compel a decision by vote. However, members of the CAC could neither achieve consensus on the principal question if there should be a vote at all, nor at the procedural question of how to vote: should the voting be conducted by a show of hands, by roll-call vote or by secret ballot? Hence, in a first vote, CAC members did not vote whether to adopt a standard for ractopamine or not, but on procedure. The first vote established that a majority of 63 votes against 54 (6 abstentions) was in favour of voting by secret ballot. Therefore, the second vote on the principal question if, in light of unbridgeable dissent, decision should be enforced by vote, was conducted by secret ballot. The crucial question submitted to delegates was this: *Do you want to proceed with a vote on adoption of the MRLs for ractopamine at this session of the Commission?*[3] That vote, conducted by secret ballot, showed that a majority of 68 votes against 59 (9 abstentions) refused to proceed with a vote on adoption of the MRLs for ractopamine. Thus, the draft standard for ractopamine remained in deadlock.

In an informal meeting during the 27th session of the Codex Committee on General Principles (CCGP) in April 2012, the US and its allies reemphasised their opinion that resistance against the adoption of MRLs for ractopamine was not based on science, but on non-scientific reasons. The EU, on the other hand, countered that at the CCRVDF level, no consensus was reached regarding MRLs for ractopamine and that therefore a precondition for sending these MRLs to the CAC for adoption was missing. Furthermore, it was criticised that the US refused to grant the visa required by members of the Chinese delegation in order to participate in the relevant session of the CCRVDF.

During its 20th session in May 2012, the CCRVDF discussed beta-adrenergic agonists in broader context. In fact, ractopamine is only one of many beta-agonists used for growth promotion purposes. Another beta-agonist waiting for evaluation and standardisation is zilpaterol. Known under its trade name *Zilmax*, zilpaterol is applied in cattle breeding for growth promotion purposes. Discussion in the CCRVDF was spurred by the US requesting that zilpaterol should be added to the priority list for JECFA evaluation. However, neither a working group preparing the issue prior to the 20th session of the CCRVDF, nor the CCRVDF itself could reach consensus whether or not to add zilpaterol to the evaluation list. Opponents such as China and the EU argued that zilpaterol

2 The text is based on reports of the CAC, available on the Internet at <http://www.codexalimentarius.org/meetings-reports/en/> (last accessed on 1 November 2012).

3 Report of the 34th Session of the CAC, para. 110, available on the Internet at <http://www.who.int/foodsafety/codex/34thCAC.pdf> (last accessed on 25 November 2012).

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was similar to ractopamine which remains blocked at step 8 of the standard setting procedure.

Ractopamine was again at the centre of interest during the 35th session of the CAC, held from 2–7 July 2012 in Rome. During this meeting, however, the proponents of ractopamine managed to obtain a thin majority of 69 against 67 votes (7 abstentions) in favour of the adoption of MRLs for ractopamine. In a press statement of July 6, 2012, the EU considered the decision-making process that led to this result as "regrettable". The EU noted that consensus-based decision-making is "one of the fundamental principles" of the CAC. The EU statement closes with the gloomy ascertainment that "for standards to be universally applicable, they also need to be universally accepted".[4]

V. Universality at Risk

The statement of the EU is worth consideration. If the tendency towards majority voting in Codex continues, the credibility of resulting standards is indeed questionable. It makes a difference whether a standard is adopted by consensus, following prior risk assessment and accepted scientific advice, or by majority voting. In latter cases, also prior risk assessments by JECFA and other scientific expert bodies are usually contested. Unsurprisingly, though, consumers may become anxious regarding food standards increasingly adopted in proceedings resembling rather to political debate than to science-based risk management.

4 Statement by the EU on ractopamine, July 6, 2012, available on the Internet at <http://ec.europa.eu/food/international/organisations/codex_en.htm> (last accessed on 1 November 2012).

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