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TARIFFS AND TRADE

Committee on Technical Barriers to Trade

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NON-APPLICABILITY OF THE CODE TO PROCESSES AND PRODUCTION METHODS AND APPLICATION OF ARTICLE 14.25

The following communication, dated 23 July 1987, has been received from the delegation of the European Economic Community.

In a communication dated 13 July 1987 (TBT/Spec/20), the United States has requested the establishment of a technical expert group pursuant to Article 14.9 of the Agreement on Technical Barriers to Trade (hereinafter the Code) in the context of its dispute with the European Community concerning the Community Directive (85/649/EEC) relating to the administration of hormonal substances to animals.

This request raises fundamental problems of interpretation of the provisions of the Code with regard to the applicability of the Code to processes and production methods (PPMs), and the conditions of application of the dispute settlement procedure to PPMs.

I. Non-applicability of the Code to processes and production methods

(a) The Community Directive constitutes a PPM

The Community Directive establishes the principle of non-administration of hormonal substances for fattening purposes to animals of which the meat is exported to the Community. It thus constitutes a regulation in the form of a process or production method and not a standard expressed in terms of product characteristics. Besides, the United States has not disputed that this Directive is indeed a PPM within the meaning of the Code.

(b) The non-applicability of the Code to PPMs follows from the Code's history

With regard to PPMs, the position of the Community has always been to reject the applicability of the Code to PPMs, both during the negotiation of the Code and in its application¹, including in the form of the use of the dispute settlement procedure (as in the spin-chilling case of 1980). This view is shared by a number of contracting parties, and is confirmed by the Factual Paper by the

¹This position is based, inter alia, on the wording of the definitions set forth in Annex 1, points 1, 2 and 3.

secretariat entitled "Negotiating History of Article 14.25" (TBT/W/15) of 2 September 1980. In the present state of rights and obligations accruing to parties under the Code, Article 14.25 is the only provision of the Code which is applicable to PPMs. It is an exceptional provision which provides not for the applicability of the Code to PPMs but merely for the possibility of invoking the dispute settlement procedures in cases where a party considers that obligations under the Code are being circumvented by the drafting of requirements in terms of PPMs rather than in terms of characteristics of products.

(c) The United States has continuously sought to extend the applicability of the Code to PPMs

It is true that a number of parties, in particular the United States, starting from the negotiation of the Code and subsequently during its application, including through the application of the dispute settlement procedure or through proposals for its interpretation, have tried to extend the scope of the Code to include processes and production methods. Thus, the United States recently proposed, in the framework of the Uruguay Round negotiations, that negotiations should be held on such an extension. This proposal necessarily implies the recognition that in its present state the Code is not applicable to PPMs. Without prejudice to the Community's position on the possibilities of launching negotiations for such an extension in an appropriate form, the Community stresses that it could in no case compromise its rights and obligations under the Code by accepting an application or a utilization of the dispute settlement procedure which would permit or simply prejudge the applicability of the Code to PPMs.

(d) The complaint and the establishment of the technical expert group are aimed at the extension of the applicability of the Code

The complaint of the United States, as set out in document TBT/Spec/18, refers to the establishment of an unnecessary obstacle to international trade, the refusal of domestic treatment, and the impeding of attainment of the objectives of the Agreement. All these obligations to which the United States refers are not applicable to a PPM but only to standards specified in terms of characteristics of products, and consequently the complaints directed on this basis against the Community Directive can only be rejected as inadmissible. Hence, any application of the dispute settlement procedure allowing verification of the merits of the complaints would clearly constitute an extension of the applicability of the Code, and thus a misuse of the procedure. In particular, the evaluation of the scientific justification for the Community measure and of whether that measure is necessary for health protection cannot be validly undertaken without presuming that PPMs are subject to the legal obligation not to constitute unnecessary obstacles to international trade. However,

such an obligation, stemming from Articles 2.1 or 7.1 of the Code, only concerns the drafting of standards specified in terms of product characteristics, and not drafting in terms of processes or production methods.

What is more, the question as to whether the PPM can be replaced by a standard specified in terms of product characteristics, which is implied by the terms of reference of the Group as requested on 13 July ("whether human health can also be assured through other means"), presumes a new obligation under which a PPM cannot validly be established if it can be replaced by a standard. Thus, the use of PPMs would become residual.

In conclusion on this point, it follows that the establishment of a technical expert group to examine the scientific justification of a PPM, and in particular the question as to whether it is necessary for the protection of human health, is clearly an extension of the applicability of the Code to the PPM, with the creation of new obligations:

- the obligation of scientific justification of a PPM;
- the direct or indirect obligation to respect obligations under the Code in establishing a PPM; and
- the obligation to resort to PPMs only on a residual basis.

II. Application of the dispute settlement procedure to PPMs

Article 14.25 provides that the dispute settlement procedures of the Code can be invoked with regard to a PPM where a party considers that obligations under the Code are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products.

(a) Interpretation of the United States

The United States construes these provisions as permitting, once a party alleges the existence of circumvention of obligations under the Code and without verification of the grounds for that allegation, the comprehensive and automatic application (according to a pre-established and compulsory order) of Article 14 to the PPM in question in order to verify the latter's compliance with obligations under the Code.

(b) There is no pre-established order for application of the procedure

This construction cannot be accepted by the Community since it leads to an extension of the applicability of the Code to PPMs, which

would occur in the event of the slightest allegation, even of the most frivolous kind. Clearly, to respect the non-applicability in principle of the Code, Article 14.25, which is an exceptional provision, cannot be interpreted as requiring the verification of the existence of circumvention within the meaning of Article 14.25. Hence, since the primary objective of this procedure is to verify the existence of such circumvention, the application of the provisions of Article 14 cannot be either automatic or comprehensive but must be specific and selective. This point is corroborated by the fact that Article 14.25 uses the term "invocation" of procedures and not the term "application". If a party may indeed invoke the procedures with respect to a PPM which it considers to be a circumvention of the obligations under the Code, it by no means has the right to require, in this specific case, the application of these procedures. The Committee, which is the body responsible under the Code for applying the dispute settlement procedure, retains the power of evaluation with respect to the appropriateness of the conditions of application of the procedure.

(c) Need for prior legal evaluation

In the specific case of application to PPMs, the Committee's power must be exercised in such a way as to preserve the rights and obligations of parties, and in particular respect for the non-applicability of the Code to PPMs. Hence, the Committee has the right and indeed the duty to avoid the application of Article 14.9, in any case at a premature stage, in other words before it has clearly been established that the PPM in question does constitute a case of circumvention within the meaning of Article 14.25.

The specific nature of the application of the dispute settlement procedure to PPMs thus requires a prior legal evaluation of the existence of the circumvention mentioned in Article 14.25 before any technical evaluation of the measure, which would prejudge the applicability of the Code to PPMs (see above, point I).

(d) There is no compulsory application of Article 14.9

Finally, the right established by Article 14.25 to invoke the dispute settlement procedures does not imply the indiscriminate application of the procedures set out in Article 14 to standards, which are covered by the Code, on the one hand, and to PPMs, not covered by the Code, on the other hand.

The dispute settlement procedures which may be invoked can only have the purpose of establishing whether, in cases where a party has had recourse to a PPM, it has circumvented obligations under the Code. Hence, Article 14.9 does not apply in this case, and could not follow from a right or obligation stemming from an extensive interpretation of Article 14.25. The latter, like any exceptional provision, must be

interpreted and applied restrictively. Therefore, its application can only be the result of a free choice by the Committee acting on the basis of the provisions of Article 14.5, an article which unquestionably does apply in the case of a PPM and explicitly refers to selection by the Committee alone. The same applies to the activity of experts or specialized bodies, which stems not from Article 14.9 but from Article 14.8, which merely establishes the possibility thereof at the Committee's discretion.

In conclusion on this point II, Article 14.25 cannot be construed as establishing, in the particular case of application of the dispute settlement procedure to a PPM, any pre-established and compulsory order for the application of all the provisions of Article 14. Such an interpretation would prejudice the applicability of the Code, which is limited by the very existence of Article 14.25, and would result in an extension of the latter, thus constituting a misuse of the procedure that goes beyond the mere settlement of disputes. Hence, Article 14.25 cannot impose the application of Article 14.9 on the Committee.

III. General conclusion

For the foregoing reasons, the United States' request for the establishment of a technical expert group pursuant to Article 14.9 cannot be justified under the dispute settlement procedure of the Code, but on the contrary represents a misuse of that procedure in terms of the applicability of the Code to PPMs and of the application of Article 14.25.

Far from leading to an application that furthers the smooth functioning of the Code and its dispute settlement procedure, it aims to misuse the latter and impede the smooth functioning of the Code by seeking to extend its applicability to PPMs and an abnormal application of the dispute settlement procedure.

The Community cannot but categorically oppose this request as well as its consideration, while stressing, that in order to avoid blocking the dispute settlement procedure, it remains prepared to accept, in the framework of the investigation provided for by Article 14.5, a request addressed to it for the establishment of a panel to evaluate the situation in the light of the rights and obligations stemming from Article 14.25 and the possible existence of circumvention as mentioned in that Article. It considers that this attitude is in keeping with the statement by the Chairman of the Committee in 1983 (TBT/M/14 of 1 November 1983), according to which the parties should, in the event of invocation of Article 14.25, co-operate in the process of dispute settlement while respecting the differences of views with regard to its interpretation.

It hopes that the United States will display the same spirit of co-operation and withdraw its improper request which does not respect the differences of views with regard to Article 14.25 and seeks to obtain undue advantages through the dispute settlement procedure, whose smooth

functioning it has already impeded by this request and the premature submission thereof, as well by rejecting any compromise, in particular in the form of the establishment of a panel. As the United States has itself recognised in document TBT/Spec/19, the dispute raises many legal problems, in particular with regard to the application of Articles 14.5, 14.9, 14.14 and 14.25. It would therefore be logical to settle those issues before demanding the arguable application of a particular provision.