GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

TBT/W/Spec/6
17 July 1987

Committee on Technical Barriers to Trade

DRAFT MINUTES OF THE MEETING HELD ON 24 JUNE 1987

Chairman: Mr. D. Bondad (Philippines)

1. The Committee pursued its investigation of the United States case against the European Economic Community Animal Hormone Directive (85/649/EEC) under Article 14.4 of the Agreement at its meeting held on 24 June 1987 in restricted session.

2. The representative of the European Economic Community recalled that since the negotiation of the Agreement the European Community had resisted all attempts by the United States to extend the obligations of the Agreement to PPMs. His delegation maintained that regulations drafted in terms of processes and production methods (PPMs) were not covered by the Agreement, except in Article 14.25, but by the provisions of the General Agreement itself. In its present case the United States had pursued its objective by proposing to demonstrate that the effect of the requirement in the Directive, drafted in terms of PPMs, was to create unnecessary obstacles to international trade, to discriminate against imports from third countries and to impede the objective of promoting international standardization work. Thus, the United States invoked nullification and impairment of benefits accruing from Articles 7.1 and 7.2 and under the Preamble of the Agreement, aiming, thereby to establish a precedent that would allow the obligations under the Agreement to be directly applicable to PPMs. The United States alleged that the effect of the EC Directive was to circumvent the obligations under the Agreement because the purpose of the Directive could have equally been met by a requirement drafted in terms of product characteristics. If the United States argument prevailed, the rights of Parties to the Agreement to draft regulations in terms of

PPMs would be limited to cases where PPMs could not, for technical reasons, be replaced by product specifications. This argument had no legal foundation, being based on the presumption of an obligation to apply a product standard rather than a PPM, there was therefore no need to verify whether it was possible to substitute a requirement which set maximum permissible residue levels of hormonal substances in meat products for the EC requirement which prohibited the administration of these substances as growth promoters in livestock production.

3. The delegation of the European Economic Community held the view that, as the Agreement was not applicable to PPMs with the exception of Article 14.25, dispute settlement provisions might be invoked only in cases of circumvention of obligations under the Agreement and in order to verify the existence of such circumvention. This was, therefore, an exceptional application of the dispute settlement procedure to PPMs which could not involve the conformity of any PPM with the provisions of the Agreement, these being inapplicable to it, but merely the verification of the allegation of circumvention. Moreover it was the responsability of the complainant to prove that the other party's PPM had circumvented obligations under the Agreement.

4. The representative of Finland, speaking on behalf of the Nordic countries, said that when addressing the question of circumvention of obligations, the Committee should consider the extent to which intention and/or impact was a decisive element for determining circumvention.

5. The representative of the European Economic Community supported by the representative of Austria said that intention, implicit in the word "circumvention", should be regarded as a decisive element for establishing circumvention.

6. The representative of Canada said that the text of Article 14.25 did not refer to any requirement to prove "intention to circumvent". Intention was a subjective element and if it were made a decisive factor

for determining circumvention, Parties could evade obligations under the Agreement by pleading lack of intent to circumvent. The representative of New Zealand joined by the representative of Switzerland, said that it was difficult to prove the intention which lay behind the action of a sovereign state because of the difficulties of access to relevant background material. If Article 14.25 were interpreted to require proof of intent by the complainant, dispute settlement procedures would apply to PPMs in only a limited number of cases. He said that the Agreement did not limit the elements that would need to be taken into account by the Committee in its consideration of a case relating to Article 14.25. The main question that would interest a Party who invoked Article 14.25 would be to determine whether the effect of other Party's circumvention of its obligations had been to create technical barriers to trade. The representatives of Hong Kong and Japan supported the views expressed by the last two speakers. The representative of Japan referred to the Anti-Dumping Legislation which had recently been adopted by the Council of European Communities and said that if proof of intent was made a rule, it should also be followed when the European Community would allege the existence of circumvention in anti-dumping cases. The representative of Switzerland said that the effect of a measure rather than the intention behind it was the determinant element for consideration of nullification and impairment of rights both under Article XXIII of the General Agreement and in the subsidies and anti-dumping area. The representative of Finland, speaking on behalf of the Nordic countries said that he also supported the view that the provisions of General Agreement applied to the effect rather than the intent of a measure. However, as circumvention could not happen by accident, the term circumvention in Article 14.25 could be interpreted to have the connotation of intention. He added that circumstantial evidence could be used in verifying circumvention of obligations in terms of this Article.

7. The representative of the United States said that the views expressed by the Parties on proof of intent concerned all future cases in which this criterion might be required to establish the existence of circumvention. Given the basic focus in the GATT framework on the effect of a measure, and

a precedent in the Textile Surveillance Body, the language of Article 14.25 should not be interpreted to require intention for proving circumvention of obligations under this Agreement. The Committee should examine whether the effect of the EC Directive, which could have described product characteristic rather than a PPM, had been to circumvent the obligations of the European Community under the Agreement.

8. The Chairman invited the Committee to focus its discussion on the procedures by which the Committee would conduct the settlement of the present dispute under Article 14 of the Agreement. The representative of the United States said that the procedural points at issue in the case before the Committee were important as they related to the effective functioning of the GATT arrangements and as well as to the discussions on the need for an improved dispute settlement mechanism in GATT. Therefore, whatever their own views on the use of hormonal substances as growth promoters, Parties should ensure that all elements of the dispute settlement procedures set forth in the Agreement were fully respected. The United States position on the procedural aspects of the case was explained in document TBT/Spec/19. Although the definitions in the Agreement excluded codes of practice from its coverage, in the negotiations parties had agreed to the language of Article 14.25 so as to include certain PPMs in the coverage of the Agreement. By invoking Article 14.25 a Party had access to the dispute settlement procedures laid down in Article 14, paragraphs 1 to 23, without any need for the Committee to approve that Party's contention that obligations under the Agreement were being circumvented. Moreover, procedures outlined in Article 14 set forth a specified order for settling disputes under the Agreement and provided precise time limits for the transition from one phase of dispute settlement to the next. He therefore refuted any contention that in a dispute involving PPMs, the complainant party should first prove that the obligations under the Agreement had been circumvented before this party could apply fully the dispute settlement procedures and, in particular, request the establishment of a Technical Expert Group (TEG). His delegation also believed that the Committee investigation and other

procedures that Parties to the dispute might invoke should be used to review and to resolve all legal as well as technical questions relating to the matter. While he hoped that the present investigation under Article 14.4 would resolve the issue, if no mutually satisfactory solution could be reached within the three months of its investigation, the Committee should go to the next phase of the procedure laid down in the Agreement and establish a TEG which should examine in particular the scientific judgements at the basis of the EC Directive and the legitimacy of these scientific judgements. In this connection, the representative of the United States reported on the outcome of the recent meeting of the Codex Committee on Residues of Veterinary Drugs: the Committee had agreed that the use of naturally - occurring hormones would be approved on a permanent basis without any qualification for withdrawal periods and without requiring further testing; approval for zeranol would be given with a withdrawal period and subject to testing; and further research would be needed for approval of trenbolone. He added that the FDA had recently given its approval for the drug use of trenbolone. The results of the Codex Committee work supported the view of his delegation that the EC Directive had no scientific basis.

9. The representative of the European Economic Community said that the Codex Committee had not yet made any recommendations. Regulations adopted by many countries in this respect had similarities with the EC Directive. The United States had invoked the dispute settlement procedures against the EC Directive in order to determine the validity and relevance of the scientific justification of the PPM in question and ultimately to limit the rights of Parties to establish PPMs. Because of the basic divergence of views among Parties in respect of Article 14.25, it was essential that the Committee address first whether, in a case involving PPMs, the dispute settlement procedure applied to all aspects of the dispute or only to the verification of the existence of circumvention. The Committee should also determine whether Article 14.25 allowed a party to invoke the dispute settlement procedures under the Agrement to verify the conformity of the PPM in question with the obligations of the Agreement before these procedures were used to verify its allegation of circumvention. An

evaluation by a TEG regarding the scientific justification of the Directive drafted in terms of a PPM, so long as the existence of circumvention of obligations had not been established, would impose an obligation of scientific justification of a PPM, thereby extending the applicability of the Agreement to PPMs. A purely scientific evaluation of health protection measures, without an assessment of the practical and overall reliability of the system, would not give an adequate guarantee for the protection of public health. He also said that, during the Committee investigation, the only concern of the United States had been to have their right to request the establishment of a TEG acknowledged.

10. The representative of the European Economic Community also said that, while Article 14 included procedures for addressing technical issues and commercial policy matters, Article 14.5 enabled the Committee to select the procedure appropriate to the case. He contested the United States argument that a party to the dispute had a discretionary right to select the appropriate procedures and, in the present case, to request the establishment of a TEG which should precede the establishment of a panel. As regards the application of dispute settlement procedures in general, the European Community held the view that provisions of the Agreement did not specify any pre-established order in the procedures for settlement of disputes; that Article 14.5 referred to a decision to be made by the Committee subject, inter alia and not exclusively, to the provisions of Article 14, paragraphs 9 and 14; and that a scientific evaluation of a measure by a TEG was neither compulsory nor automatic but was reserved to appropriate cases as Article XX recognized the sovereign rights of governments to protect health and safety of their population.

11. The representative of Argentina said that the use of hormonal substances as growth promoters was banned in his country since 1961. The Committee should base its consideration of the technical issues involved in the dispute on the results of the work of the Codex Alimentarius Committee on Residues of Veterinary Drugs, which had a wider participation than any TEG to be established in the context of the Agreement.

12. The representative of Brazil, said that the Committee should follow the course and timetable of procedures set out in Article 14 so as not to create a precedent for departures from these procedures in the resolution of future disputes. The representative of Switzerland said that, according to Article 30 of the Vienna Convention on Treaties, Parties should rely on the wording of international agreements. The representatives of Brazil and Switzerland, while reserving the position of their delegations as to the substance of the matter, supported by the representatives of Chile and Hong Kong, recognized that the United States was entitled to request the establishment of a TEG under Article 14.9 of the Agreement.

13. The representatives of Canada, New Zealand and Switzerland stated that, upon the request by the United States, the Committee should automatically establish a TEG. The representative of Switzerland nevertheless said that the findings of a TEG would not be adequate to reach a solution to the matter before the legal issues underlying the case were settled.

14. The representative of Finland, speaking on behalf of the Nordic countries stated that in the present phase of the dispute settlement, the Committee was responsible for facilitating a mutually satisfactory solution to the matter and for that purpose it could make use of the procedures enumerated in paragraphs 3 to 8 of Article 14. For the time being it seemed unlikely that the Committee investigation would facilitate a solution on the substance of the problem. The Committee could therefore select the appropriate procedures for handling the matter under Article 14, paragraph 5. He also drew attention to the provisions of Articles 13.2 and 14.8 of the Agreement which gave the Committee the possibility of seeking information, advice and assistance from working parties, technical expert groups, panels or other competent bodies. In the view of the Nordic delegations, parties to the dispute should resort to the procedures available to them under paragraphs 9 and 14 of Article 14, only after the Committee had explored all possibilities for resolving the matter. The Nordic delegations, therefore, made the following proposal as a

contribution to facilitate the solution of the procedural aspects of the dispute:

"The Committee acting under Article 14, paragraphs 4 and 5 of the Agreement decides to set up a panel to examine all aspects of the issue. The panel should be directed to work according to Article 14, paragraphs 15 to 18 including Annex 3 of the Agreement.

"The panel should be instructed to start its examination on the aspect of circumvention of obligations under the Agreement in terms of Article 14.25. If it concludes that circumvention has taken place, it should proceed by examining the trade effect and the justification of the EEC Directive.

"The panel should also be instructed to consult with technical experts, as appropriate."

He said that the Committee could give the appropriate instructions to such a panel so that it could deal with the legal and technical aspects of the matter together. Furthermore, the establishment of a panel under paragraphs 4 and 5 of Article 14 would not prejudge the rights of Parties under paragraphs 9 or 14 of Article 14, it being understood that before resorting to the provisions of these Articles, parties should give the panel a reasonable opportunity to finalize its work within a time-frame of four months, normally provided to panels established under Article 14.4. He also said that he doubted whether it was opportune to establish a TEG at the present stage for the following reasons: a finding by a TEG would not be adequate to resolve the dispute without a subsequent consideration of the legal aspects of the issue by a panel; the time required by the TEG for delivering its findings to the Committee would delay a rapid solution of the problem; and according to Annex 3 of the Agreement a panel could seek technical advice necessary to its examination of the matter.

15. The representative of the United States said that his delegation appreciated the efforts made by the Nordic delegations to find a solution

to the procedural aspects of the matter but the Nordic proposal developed a new mechanism which was not included in the procedures of the Agreement: it made a distinction between a Committee panel and panel established upon the request of a Party under Article 14.14. It also created an interim step which extended the investigation period beyond the time-limit specified in the Agreement. His delegation considered that any further elaboration of the dispute settlement procedures defined in Article 14 of the Agreement was unwarranted. As of then, the investigation under Article 14.4 had not resulted in a mutually satisfactory solution of the matter and to request the establishment of a TEG under Article 14.9 was the only alternative open to the United States as a party to the dispute.

16. The representative of the European Economic Community said that his delegation reserved its position on the Nordic proposal. Meanwhile, he stated that the establishment of any group under the dispute settlement procedures of the Agreement, whether under Articles 14.5, 14.9 or 14.14, would be decided by the Committee.

17. The representative of New Zealand supported by the representative of Switzerland, said that the Nordic proposal had merits because it would enable the panel to address both the legal and the technical aspects of the problem. Also, according to this proposal, parties to the dispute would maintain their rights under Article 14, paragraphs 9 and 14.

18. In concluding the discussion at the present meeting, the Chairman suggested that the Committee pursue its investigation until the expiry of the three-month period provided for its investigation, i.e. 29 July 1987, with a view to facilitating a mutually satisfactory solution of the matter. The representative of the European Economic Community said that in continuing its investigation under Article 14, paragraphs 4 and 5, the Committee should also consider solutions on the substantive aspects of the matter. The representative of the United States said that if no mutually satisfactory solution was forthcoming in the interim, the Committee should meet before the closing date of the investigation period in order to consider the next phase of dispute settlement procedures.

19. The Committee took note of the statements made and agreed that the date of its next meeting in restricted session would be fixed by the Chairman in the light of consultations with interested delegations. The purpose of this meeting would be to resume the Committee investigation under Article 14.4.