GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

TBT/M/Spec/7
2 October 1987

Committee on Technical Barriers to Trade

MINUTES OF THE MEETING HELD ON 23 JULY AND 28 JULY 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 third meeting held on 23 July and 28 July 1987 in restricted session.

2. The representative of the United States noted that no mutually satisfactory solution of the dispute had been reached either in the Committee investigation under Article 14.4 or in bilateral consultations which had taken place during the three months period following his delegation's request of 29 April 1987 for a Committee investigation. He said that the Committee should now proceed to the next phase of the dispute settlement procedures and establish a technical expert group (TEG) as requested by the United States on 15 July 1987 (TBT/Spec/20). His delegation was prepared to discuss proposals for conciliation on substantive grounds at any stage of dispute settlement procedures, even after the establishment of a TEG but it was not willing to consider any compromise on the procedural aspects of the dispute until it had been demonstrated that the dispute settlement provisions of the Agreement, as written, could not operate in this case.

3. The representative of the European Economic Community said that the Committee investigation under Article 14.4 was still continuing. It was untimely to make plans for the later stages of dispute settlement on the assumption that the Committee had not been able to fulfill its task of finding a mutually satisfactory solution because the conciliatory phase was not limited to the period of three months.

4. The Chairman invited Parties at the present meeting to focus first on issues that might form the basis of a solution to the substance of the dispute.

5. The representative of the United States recalled that his delegation had made a written proposal to the European Community under Article 14.2 in February 1987 which suggested that the European Community should take all necessary steps to ensure that sections of the EC Directive that affected imports of meat were rescinded, that those sections were not implemented, and that trade with third countries was not impeded (TBT/Spec/18, page 2).

6. The representative of the European Economic Community said that the solution that had been suggested by the United States could by no means be regarded as mutually satisfactory to both Parties to the dispute. The complaint of the United States should not deter his authorities from applying the measures that they had adopted to protect the health and safety of their population.

7. The representative of Austria, supported by the representative of Argentina, said that their authorities could not support the United States proposal which suggested that imports of meat treated with hormonal substances should receive more favourable treatment than domestic meat production. The representative of Argentina added that, while for his country the matter was theoretical since it did not import meat products, it would be difficult for his authorities to discriminate against domestic production which had been subject to a ban on the use of hormonal substances since 1961.

8. The representative of the United States said that the problem would also be solved if the European Community could accept the FDA drug approval and residue testing programme in the United States as providing a guarantee for human health and safety equivalent to the ban proposed in the Directive.

9. The representative of the European Economic Community said that the United States applied the residue testing programme in conjunction with a liberal policy on use of hormonal substances as growth promoters. The human health hazards that these substances represented meant that the European Community could not consent to a system which provided no means of control on the administration of such substances which were used in the raising of some twenty to forty million animals per year.

10. The representative of the United States said that consumer protection issues were regarded as being just as important in his country as in the countries of the European Community. The FDA had been regularly reviewing the use of hormonal substances as growth promoters over the past twenty years. According to the experts of the FDA, there was no scientific basis to affirm that hormonal substances or methods of their administration to animals in the United States represented any hazards for human health and safety. This view was also shared by scientists at the international level. Recognizing the importance of health and trade issues related to hormonal substances, the joint FAO/WHO Expert Committee on Food Additives had convened a meeting of experts to evaluate the safety of residues of veterinary drugs in foods. The experts participating in this meeting, who had examined the matter on the basis of the scientific literature and of the current state of knowledge, had concluded that it was not necessary to set an acceptable daily intake or an acceptable residue level for endogenous hormonal substances. The respective acceptable daily intake and residue levels which had been recommended by the experts for xenobiotic hormonal substances, zeranol and trenbolone acetate, were higher than the maximum permissible levels established by the FDA. The report of this expert group would be issued in six months.

11. The representative of the European Economic Community said that the protection of consumer health was not merely a matter of a pure, theoretical scientific approach to the safety of hormonal substances. Although the United States delegation claimed that hormonal substances were safe, their residue testing programme took account of problems connected with the practical use of these substances and set conditions of use which should be fulfilled in order to guarantee the safety of meat treated with hormonal substances. The experts participating in the Codex Committee on

residues of veterinary drugs in foods had made their conclusion on the safety of hormonal substances subject to their use in accordance with good veterinary and animal husbandry practices. The European Community had questioned the reliability of the practical application of methods for treatment of twenty to forty million animals and had adopted the Directive as the best way of avoiding any health risks connected with the use of hormonal substances. As regards the certitude of experts in the United States concerning the innocuousness of hormonal substances, he recalled the experience with diethylstilboestrol which the FDA had authorized for more than twenty years before discovering that it was carcinogenic.

12. The representative of the United States stated that the use of hormonal substances as administered through legally prescribed practices provided a better guarantee for protecting public health. Under a system prohibiting the use of hormones there would always be the risk of fraudulent use of these substances. The representative of the European Economic Community said that the public authorities should be able to guard against any fraud. In the Community countries, the sale and distribution of these substances would be prohibited, and their production would be subject to control. If hormonal substances were freely on sale without any control on their administration to animals, it could not be expected that all cattle raisers would have sufficient civic responsibility to observe the legally prescribed conditions of use.

13. The representative of the European Economic Community said that the Community had an annual demand for imports of about seventy thousand tons of offals from the United States because it had a deficit in meat production. The United States could continue to export meat products to the Community markets after the entry into force of the European Directive, if the "no hormones" label, developed in the United States at the request of a consumer group, were to be granted to exports of meat to the European Community by official veterinary services under verified production control programmes. The representative of the United States said that the nature of growing, slaughtering and labelling practices in the United States did not allow the use of "no hormones" labels on exports of meat products, since it would not be easy to segregate, identify and tag these products, which consisted mainly of offals.

14. The representative of the European Economic Community said that his delegation had made a second proposal to the United States delegation in the bilateral consultations. Article 7 of the Directive allowed the EEC Council to adopt derogations from the ban on use of hormonal substances in respect of intra-Community trade and trade from third countries in meat from animals previously intended for reproduction and treated with hormonal substances to that end. Pursuant to the discussions carried out with several meat exporting countries, the EEC Commission had recently prepared a proposal which would extend the application of the provisions of Article 3(b) of the Directive to intra-Community trade and trade from third countries. Following the adoption of this modification to the Directive by the Council, the use of hormonal substances for therapeutic and similar treatment, including improvement of fertility, would be authorized under the control of a veterinarian and subject to certain conditions. The

representative of the United States said that authorities in any meat exporting country would not agree to certify their meat products in such a way which would imply that the health condition of every animal in their country, raised for the production of meat for export, required therapeutic treatment. The representative of the European Economic Community hoped that the modification of the relevant provisions of the Directive would be considered by the United States authorities as a favourable response as regards their complaint on the discriminatory treatment of imports from third countries.

15. The representative of New Zealand recalled that the EC Directive would enter into force on 1 January 1988 and asked whether the European Community authorities would be prepared to postpone the implementation date for a certain period as a contribution to facilitating a solution to the dispute. The representative of the United States said that his delegation had been concerned about the approaching implementation date and had already urged the use of expedited dispute settlement procedures under Article 14.6. The Chairman said that additional time would provide further opportunity for consultations between Parties to the dispute and invited the delegation of the European Economic Community to give due consideration to the suggestion by the representative of New Zealand. The representative of the European Economic Community said that the Directive would have to be amended in order to delay its entry into force and that such an amendment would require the legislative approval of the European Parliament. While he did not think that a postponement was likely under the present circumstances, he would transmit the proposal of New Zealand to his authorities. In reply to a question by the representative of the United States, he said that Article 9 of the Directive gave member States the possibility of waiving the domestic implementation of the ban for a maximum period of one year but that to date no member State had requested a derogation.

16. The Committee took note of the above proposals and comments.

17. The Chairman invited Parties to express their views on the procedures which should be followed in order to facilitate the settlement of the dispute.

18. The representative of the European Economic Community said that Article 14.5 permitted the Committee to select, during the phase of investigation, the appropriate procedures for the settlement of the dispute. The Nordic countries had made a proposal at the previous meeting (TBT/M/Spec/6, paragraph 14) for action by the Committee in accordance with this Article. The Nordic proposal had the merit of taking into account the positions of the Parties to the dispute as regards the conditions of application of Article 14.25. Although the suggestion in the proposal regarding the consultation of technical experts by the panel differed from the Community's position in this respect, his delegation was prepared to accept the thrust of this proposal.

19. The representative of Finland, speaking on behalf of the Nordic countries, considered that their proposal provided the most appropriate procedures for the settlement of the present dispute. In formulating this proposal, they had reviewed a number of points which had been of concern,

in particular, to the delegation of the United States: the first point concerned the time element. The United States had asked for expeditious settlement of the dispute in view of the entry into force of the Directive on 1 January 1988, but the examination of the matter by a TEG as requested by the United States would take at least six months. Because the dispute before the Committee involved issues not only of a technical nature but also of a legal order, no mutually satisfactory solution could be reached on the basis of the findings of a TEG without the establishment of a panel under Article 14.4, which would require another four months to deliver its findings. The panel suggested by the Nordic countries could examine both the legal and the technical aspects of the issue and could finalize its work within the time frame of four months normally provided for panels. Secondly, as the United States had invoked the circumvention of obligations as the fundamental issue in its complaint against the European Community, the Nordic delegations suggested that the panel should be instructed to start its work by an examination of whether circumvention in terms of Article 14.25 had occurred. Thirdly, the Nordic proposal did not exclude a possible review of the scientific justification of the EC Directive requested by the United States because it suggested that the panel should examine all aspects of the issue. He also said that the second paragraph of the Nordic proposal set a specific order for the examination of the different aspects of the matter: establishment of existence of circumvention before an examination of the trade effect and justification of the Directive.

20. The representative of the United States said that the Nordic proposal did not guarantee the right of his country to request the establishment of a TEG under Article 14.9 in future. The representative of Canada, supported by the representatives of Argentina and New Zealand, said that her delegation welcomed the efforts by the Nordic countries to find an acceptable compromise on the procedural aspects of the dispute, but was of the view that as the United States delegation could not accept it, the Committee should automatically establish a TEG as requested by the United States and as provided in the Agreement.

21. The representative of Switzerland said that his delegation supported the right of the United States to request the establishment of a TEG. However, he considered that the circumvention of obligations was the main problem in a case invoked under Article 14.25. The Nordic proposal would permit the circumvention aspect to be examined in the light of consultations with technical experts. The representative of New Zealand said that considerations of a technical nature would be relevant in establishing the existence of circumvention. The representative of the European Economic Community said that the Committee could consult technical experts both on the basis of the Nordic proposal and under Article 14.8.

22. The representative of the United States said that Article 14.25 applied to PPMs under exceptional and restricted circumstances: when a requirement drafted in terms of a PPM circumvented the obligations of the Agreement and when this requirement could have been drafted in terms of product characteristics. The representative of the European Economic Community said that his delegation inferred from this argument that circumvention was the cause and not the effect of application of

Article 14.25 to PPMs. The application of Article 14.25 to a PPM would require a prior legal evaluation of circumvention mentioned in this Article. Because Parties had no obligations with respect to PPMs before the existence of circumvention was established, a prima facie technical evaluation of a measure drafted in terms of PPMs would prejudge the application of the Agreement to the PPM in question. The second criteria referred to by the United States delegation would presume a new obligation under which a requirement could not be drafted in terms of a PPM except in residual cases when it would be technically impossible to draft the requirement in terms of product characteristics. So long as the existence of circumvention was not established, the question of whether it was technically feasible to replace a PPM by a regulation drafted in terms of characteristics of the product was not relevant to a determination of applicability of Article 14.25 to the measure in question.

23. The representative of New Zealand, supported by the representative of Switzerland, said that while the dispute settlement procedures invoked under Article 14.25 should mainly be used to address the problem of circumvention, a Party to the dispute who considered the issues to relate to questions of a technical nature could invoke the procedures under Article 14.9 in order to determine applicability of Article 14.25 to the specific case of PPM. A TEG would consider whether the objective of a requirement drafted in terms of a PPM could have been equally attained through a product standard. The representative of Switzerland said that the problem of circumvention could only arise in cases in which the safety objective of the measure could be attained by drafting the requirement either in terms of PPMs or in terms of product characteristics. If not, the allegation of circumvention would not be relevant in the particular case. Therefore the TEG should first focus on this question. Only when this was established, would the GATT, the Committee or a panel established under GATT, have the jurisdiction to address questions relating to the safety of using hormones and eventually arrive at conclusions on the scientific justification of the EC Directive.

24. The representative of the European Economic Community said that in their proposal for the terms of reference of the TEG (TBT/Spec/20, page 2), the United States did not suggest only a review of the technical feasibility of replacing the requirement in the EC Directive by a requirement drafted in terms of product characteristics. They also asked for an examination of the question of whether the measure taken by the European Community was necessary for the protection of human health or whether human health could also be assured through other means, in this particular case, through the establishment of maximum permissible levels for hormonal substances. But this did not come down to the question of whether a PPM could be replaced by a product standard which gave the same results, but rather to whether two different approaches to protection of health and safety could be substituted. He doubted that experts in endocrinology or toxicology could settle, on a theoretical basis, the question of safety of meat treated with hormonal substances as there was no guarantee that in practice the conditions of use were observed in administrating these substances to twenty to forty million animals. Furthermore, to establish a TEG with the terms of reference laid down in TBT/Spec/20 before the existence of circumvention had been verified would

be to prejudge obligations of the Community under the Agreement in respect of PPMs. It would also have a negative impact on the national policies of several other Parties who had banned the use of hormonal substances in their countries. Finally, it would wrongly extend the application of the Code to PPMs, because each time a Party invoked Article 14.25 based on its allegation of circumvention, the legitimacy and scientific justification of the PPM would be examined by a TEG, although the question of the applicability of the Code to the PPM had not yet been resolved.

25. The representative of Austria said that his delegation objected to an evaluation of the EC Directive by a TEG, the conclusions of which might put into question the credibility of the national policies of all countries banning the use of hormonal substances as growth promoters. The representative of Argentina wondered about the implication for long standing legislation in other countries of a conclusion by a TEG that similar measures adopted by the European Community were not necessary for the protection of human health. The representative of the United States said that their contention was not that other Parties should accept the use of hormonal substances in a manner that would endanger human health. They expected a TEG to demonstrate that human health could also be assured by observing maximum permissible residue levels of these hormonal substances.

26. The representative of the United States said that the Codex Committee on residues of veterinary drugs in foods was the appropriate international forum for reviewing scientific questions involved in determining the safety of hormonal substances used as growth promoters. But because the European Community had not waited for the conclusions of the Codex Committee before adopting its Directive, which would have a considerable negative impact on international trade, the United States had been compelled to exercise its rights under the Agreement and to ask for the establishment of a TEG to address this question. Meanwhile, his delegation had suggested in TBT/Spec/20 that the TEG expedite its work by reviewing, among other things, the work of the Codex Committee. The representative of Argentina said that it would be advisable to wait for the conclusions of the Codex Committee which would soon be available. The representative of the European Economic Community said that his authorities attached importance to the work of Codex as it was a forum responsible for harmonization at the international level. He noted, however, that the Codex Committee was also reviewing problems connected to D.E.S. and questioned whether the United States would be prepared to suspend their ban on this product until the Codex Committee delivered its results on this substance. Otherwise, the Community was no more obliged than the United States to postpone the application of its measure pending the results of that work.

27. The representative of Finland, speaking on behalf of the Nordic countries, said that Article 14.9 and 14.10 and Annex 2 of the Agreement prescribed respectively the terms of references and the operating procedures of TEGs. He wondered why the delegation of the United States had felt it necessary to make alternative suggestions (TBT/Spec/20, page 2) in this respect. Meanwhile, according to point four of the terms of reference set out in Article 14.9, the Committee could decide on the appropriateness of including in the mandate of a TEG the element of detailed scientific judgements involved in a dispute. The Nordic

delegations maintained that if and when a TEG were to be established, it should not be called upon to make scientific judgements on the EC Directive at this stage of the dispute.

28. The representative of the United States said that the proposals in TBT/Spec/20 in respect of terms of reference, composition and operating procedures, were based on the provisions of the Agreement and on GATT practice on dispute settlement but that the Committee could discuss the appropriate terms of reference of the TEG after its establishment. At this juncture, the Committee should consider the United States request under Article 14.9 and establish a TEG.

29. The representatives of Brazil, Chile, Hong Kong, Japan and Korea said that since the Committee investigation under Article 14.4 had not led to a mutually satisfactory solution of the dispute, their delegations had no objection to the establishment of a TEG as requested by the United States in terms of Article 14.9. The representative of Hong Kong said that his delegation attached importance to the effective functioning of dispute settlement procedures under the Agreement. These provisions should be interpreted and applied in such a way that they themselves did not create technical barriers to trade. The representative of Austria said that an examination of technical issues under Article 14.9 would not solve the problem. The dispute also involved legal questions which called for findings by a panel.

30. The representative of the European Economic Community said that the Committee should see to it that the dispute settlement procedures were applied in a balanced way so as to preserve the rights and obligations of Parties, taking into account the divergence of views among Parties on the application of dispute settlement procedures to PPMs. The delegation of the United States had sought to impose its unilateral interpretation of Article 14.25. The European Community considered that, while the provisions of Article 14.25 entitled a Party to invoke the dispute settlement procedures with respect to a PPM, it was for the Committee to decide on the procedures it would be appropriate to apply to the case in question. The procedures in Article 14 were designed for measures that fell under the coverage of the Agreement and could not apply indiscriminately to a case of PPMs prior to a legal evaluation of the existence of circumvention. So long as circumvention had not been proven, the Community opposed the request for the establishment of a TEG to examine the scientific justification and legitimacy of the EC Directive, and in particular the question of whether it was necessary for the protection of human health. This request represented a misuse of the dispute settlement procedures for the case of PPM and it had been put forward with the specific purpose of extending the applicability of the Agreement to PPMs.

31. The representative of the United States expressed regret that the procedures that were clearly designed to be automatic were not followed because one of the Parties to the dispute held a different view on the application of these procedures. Work in the GATT depended on resolution of disputes through agreed procedures. His delegation relied on the wording of Article 14.25 for its interpretation and was not asking for the

creation of additional rights or obligations. If the Committee were not able to establish a TEG in accordance with the wording of Article 14.9, which stated that the Committee "shall establish", it would set a bad precedent for the functioning of the Agreement and its dispute settlement procedures. His delegation only hoped that Parties would support the rights and obligations to which they had subscribed in signing the Agreement. The Committee had already addressed the issue of settlement of disputes raised under Article 14.25 and Parties had agreed to co-operate in the process (TBT/M/14, paragraphs 14-15). For the United States, the term co-operation meant adhering to the obligations specified in the Agreement. It did not imply that a Party should be expected to waive its rights.

32. The representative of Switzerland said that his delegation believed that contractual rights must be taken seriously and endorsed the concerns expressed by the United States on the effective functioning of the Agreement.

33. The representative of Austria said that, had Article 14.9 provided for automatic establishment of a TEG, the term "must establish" or "had to establish", rather than "shall establish" would have been used. He added that the Committee should follow the GATT tradition of consensus in taking its decisions, and in the present case it had not been possible to arrive at a consensus for the establishment of a TEG.

34. The representative of the European Economic Community said that the Committee faced a problem regarding the application of the dispute settlement procedures as regards the PPMs and not a problem arising from the normal functioning of these procedures. Notwithstanding the conclusions of the Committee in 1983, which recognized the divergence of views among Parties in respect of Article 14.25, the United States had attempted to impose its own interpretation of this Article. In order to avoid blocking the dispute settlement procedures, the Community was prepared to support a compromise solution on the basis of Article 14.5 for the establishment of a panel to evaluate the rights and obligations of Parties deriving from Article 14.25 in the case of the present dispute. However, the Community formally opposed consideration of the request by the United States under Article 14.9.

35. After a brief discussion the Committee took note that both Parties to the dispute agreed to hold a further meeting to pursue the investigation under Article 14.4. The Chairman would fix the date of this meeting in consultation with interested delegations.