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Committee on Sanitary and Phytosanitary Measures

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**THE CODEX ALIMENTARIUS COMMISSION:
THE PROBLEM OF WTO CONSIDERATIONS INFLUENCING CODEX DECISION-MAKING**

SUBMISSION BY THE UNITED STATES OF AMERICA

The following communication, received on 10 October 2018, is being circulated at the request of the Delegation of the United States of America.

1 INTRODUCTION

1.1. The United States has noted its concerns with certain activities of the Codex Alimentarius Commission apparently related to the intersection of Codex standards and the WTO SPS Agreement. Below, we elaborate on certain of these concerns, with the aim of promoting greater awareness among WTO Members of their potential implications.

2 BACKGROUND

2.1. At the July 2018 meeting of the SPS Committee, the Codex secretariat reported on the decision of the Chairperson of the Codex Committee on Residues of Veterinary Drugs in Foods (CCRVDF) not to move the MRL for the veterinary drug Zilpaterol to Step 5, despite consensus on the science and the safety of this veterinary drug. The CCRVDF Chairperson cited a lack of consensus on moving the MRL due to factors outside the mandate of Codex. During the Codex secretariat's report to the July 2018 SPS meeting, the Codex secretariat representative indicated that the real concern among some Codex Members may have to do with the status of Codex standards relative to the WTO SPS Agreement.

2.2. The Codex secretariat further suggested that Codex standards being referenced in the SPS Agreement has been negatively influencing discussions in Codex due to some Members' fears that they could be challenged at the WTO with respect to failure to adopt specific Codex standards. Finally, the Codex secretariat reported that the Legal Offices of the World Health Organization and the Food and Agriculture Organization, the Chairperson and Vice Chairs of Codex, and the Codex secretariat are preparing a report on issues related to the periodic blocking of standards in Codex to be discussed at next year's Codex Executive Committee (CCEXEC) and next year's Codex Alimentarius Commission.¹

3 SUMMARY

3.1. In the view of the United States, two significant concerns arise from these developments:

- First, we are concerned that statements of legal interpretation concerning the SPS Agreement and its implications may be included in the planned report. Legal interpretation of WTO Agreements falls outside of the mandate of the Codex secretariat as well as the other entities involved in drafting the report. The expertise of Codex is food safety not WTO obligations. The United States is concerned about the implication that consequences of Codex standards, guidelines, and recommendations under the WTO Agreements should have bearing on Codex activities;

¹ See G/SPS/92/Rev.1, section 3.2.2.

- Second, the decision with respect to Zilpaterol, noted above, represents an example of decision-making based on an inappropriate consideration: potential WTO vulnerabilities. Codex basing decisions regarding MRLs, or other food safety standards, guidelines, or recommendations, on considerations outside of Codex's mandate – particularly on the potential WTO implications of those decisions – continues to be a significant source of concern. This is not the first time that such considerations have delayed important actions with respect to MRLs, a concern we have raised in this Committee previously.²

4 THE PLANNED REPORT TO CCEXEC

4.1. The United States supports the unique dual mandate of Codex: to protect the health of consumers and ensure fair practices in the food trade. The procedural and scientific foundation of Codex helps ensure that the international standards developed in Codex are science-based, globally relevant, fit for purpose and reflect current best practices in countries around the world.

4.2. The credibility and reliability of Codex, however, rests on Codex operating within its mandate, and taking decisions on the basis of considerations within its mandate. Clearly, opining on the WTO covered agreements, including on the implications of Codex MRLs or other food safety standards, guidelines, or recommendations under those agreements, is outside the mandate of Codex.

4.3. The United States was accordingly concerned to hear that a report on WTO implications of Codex standards is being prepared by the Codex secretariat, along with the WHO and FAO legal offices and the Codex Chairperson and Vice-Chairperson. The planned report appears structured in a way that is likely to involve the drafting entities in such interpretation.

4.4. Neither Codex nor the other drafting entities have the authority or the expertise to do a legal analysis of WTO implications. As discussed below, decisions of the Codex Alimentarius Commission must be grounded in the Codex *Procedural Manual*, not driven by their WTO implications.

4.5. Based on the information now available, the planned report appears aimed at setting up discussion in Codex concerning the WTO implications of Codex decisions. While the United States would welcome discussion in Codex about how to prevent WTO implications from influencing Codex decisions, the appropriate forum for any exploration of the WTO implications of Codex decisions – including their implications under the WTO SPS Agreement – is the WTO.

5 INTRUSION OF WTO CONSIDERATIONS IN THE CODEX MRL ESTABLISHMENT PROCESS

5.1. Scientific support is crucial in the context of Codex decision-making on MRLs. Basing MRLs on science protects consumer health and provides a level playing field for all countries.

5.2. A core obligation of the SPS Agreement is for Members to ensure that their SPS measures are "based on scientific principles and ... not maintained without sufficient scientific evidence." (Article 2.2). Closely related to this obligation, Article 5.1 of the SPS Agreement provides that Members shall "ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health."

5.3. Harmonization based on international standards, guidelines, and recommendations can be an important tool for achieving these objectives, particularly for Members that lack resources to perform a significant volume of their own risk assessments. The Agreement implicitly recognizes the role of international standards, guidelines, and recommendations with respect to scientific justification and risk assessment by providing that SPS "measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994." (Article 3.2).

5.4. Codex establishment of MRLs on the basis of considerations outside its mandate runs contrary to the assumptions underpinning the SPS Agreement and potentially undermines the value of those MRLs.

² See G/SPS/R/90 section 4.5.1.1.

5.5. The United States is particularly concerned about Codex allowing WTO implications of MRLs to drive its decision-making about whether, or at what levels, to set MRLs.

5.6. The reliability of Codex decisions rests on their grounding in criteria outlined in the *Codex Procedural Manual*, and in not being driven by countries seeking to influence WTO outcomes to favor their country or region.

5.7. Members may lose confidence in Codex standards if they perceive that those standards are designed to achieve particular WTO outcomes, instead of being promulgated without regard to WTO implications. We want to avoid further situations where the WTO 'tail' wags the Codex 'dog'.

5.8. Loss of confidence in Codex would be damaging to countries at various development levels that may lack resources to set up and maintain complex food safety risk assessment programmes and that rely on Codex MRLs as a means of ensuring health of domestic consumers while at the same time satisfying their obligations to trading partners.

6 CONCLUSION

6.1. To the extent WTO Members feel that there is a need for examination of the WTO implications of Codex standards, guidelines, and recommendations concerning food safety, we invite Members to initiate discussions in the WTO SPS Committee.

6.2. We encourage WTO Members to clarify in the context of Codex discussions and meetings that Codex should not be opining on WTO legal matters, and should remain laser-focused on establishing food safety standards, guidelines, and recommendations based on considerations within Codex's mandate.
