GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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Committee on Technical Barriers to Trade

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COMMITTEE INVESTIGATION PURSUANT TO
ARTICLE 14:4 OF THE AGREEMENT

The following communication, dated 9 June 1987, has been received from the delegation of the United States.

THE EC ANIMAL HORMONE DIRECTIVE (85/649/EEC)

Points for Consideration in the Committee's Investigation
Under Article 14:4 of the Agreement

The Committee on Technical Barriers to Trade (Committee) commenced its investigation under Article 14.4 of a case raised by the United States concerning a European meat certification system. Significant challenges confront the Committee as it conducts an investigation of the case raised by the United States. These challenges include a review of both the "legal" arguments behind the case and a number of technical matters.

Procedural Points at Issue in this Dispute

At its last meeting (May 22, 1987) this Committee initiated an investigation under Article 14.4 of the Agreement on Technical Barriers to Trade (Agreement) on a meat certification system maintained by the European Community (EC). The United States believes that the procedure that the Committee must follow is clearly set forth in Articles 14.3 through 14.26. Now that the investigation has commenced, the next step is for the Committee to attempt to find a mutually satisfactory resolution. If this is not possible within three months, then under Article 14.9 the Committee must establish a technical expert group if requested by the US. However, the United States need not wait to table such a request, particularly as the product in question is perishable and Article 14.6 calls for the expeditious resolution of cases involving perishable products). The technical expert group has up to six months to finish its work. After it has done so, a panel can be convened to review the trade policy and "legal" aspects of the case.

The Agreement could not be clearer. There is a specified order for proceeding with dispute settlement, and specific time periods are provided for the transition from one step to another. The next step following the Committee's investigation, as provided in Article 14.9 is the establishment of a technical expert group. As stated in Article 14.9 "...upon the request of any party to the dispute who considers the issues to relate to questions of a technical nature the Committee shall establish a technical expert group."

The EC argues that as the case involves "processes and production methods" (PPM's), and so the Committee's investigation must start with a review of the dispute's "legal questions," particularly whether the Agreement has been circumvented in the manner stated in Article 14.25. The EC believes that in order to use this article, the U.S. must prove "intentionality" behind the EC's actions (i.e., that the EC intended to circumvent the Agreement). The EC has presented the theory that only after the United States proves "intentionality" is the United States entitled to request establishment of a technical expert group.

The EC's argument lacks a reasonable basis. It wholly misconstrues the clearly defined course of dispute settlement outlined under the Code. If accepted by the Committee, the EC's interpretation will seriously and permanently undermine the integrity of the Code. The well-defined dispute settlement procedure with its precise timetable will be subjugated and the Committee would have set a dangerous precedent for the resolution of future disputes.

Furthermore, the EC's argument of "intentionality" is without legal foundation. The entire framework of the General Agreement is founded on the effects of another party's actions. In fact, in another forum, the EC argued that the need to prove "intentionality" is without legal foundation. Article 8, paragraphs 1, 2 and 4 of the Arrangement Regarding International Trade in Textiles and Article 16 of its 1986 Protocol of Extension contain pledges by participating countries to avoid circumvention of the Agreement. In a dispute in the Textile Surveillance Body the member from the EC took the position that a finding of circumvention did not require a finding that the country intended to circumvent.

The same logic applies to Article 14.25. The language of this article does not require proof of "intentionality". Thus, given the basic focus of the GATT on the effects and the precedent established in the TSB, no such proof should be required under the Agreement on Technical Barriers to Trade. The United States considers that the effect of the EC's directive on animal hormones, which could have described product characteristics through the setting of residue levels, is to circumvent the EC's obligations under the Agreement.

Invocation of Dispute Settlement

The United States believes that the Committee's investigation and the Agreement's dispute settlement procedures must include all aspects of the case and permit access to any of the articles on dispute settlement (i.e., those from subparagraph 3 to 26 of Article 14). In this regard, the United States realizes that there a numerous legal arguments and a number of technical questions.

Among the legal arguments that need to be resolved are:

- the procedures the Committee might use under Article 14.5;
- the constitution of the technical expert group envisioned in Article 14.9;
- the constitution of the panel envisioned in Article 14.14; and,
- the effect of Article 14.25.

Among the technical matters that need to be reviewed are:

- the establishment of residue levels in animals for hormonal substances;
- the scientific judgments involved behind the determination that hormonal substances are safe; and,
- the legitimacy of these scientific judgments.

The Agreement sets out an order for reviewing these arguments and questions: bilateral consultations first, multilateral mediation second -- the Committee's investigation, technical expert group third, and panel fourth. Specific time periods for the transition from one step to the next are one way in which the Agreement ensures that footdragging from one Party does not prevent or impede the dispute settlement procedures.

Technical Questions

As the case proceeds, the United States intends to address all of the arguments and questions noted above. The United States has already addressed the important issue of how product characteristics can be described for meat from animals treated with hormonal substances. This information was included in the paper circulated at the last Committee meeting (May 22), which was prepared by Dr. Gerald Guest, Director of the Food and Drug Administration's (FDA) Center for Veterinary Medicine. The United States also provided the Committee with the text of a speech by Dr. Lamming, who heads the suspended EC Commission advisory group on hormones. In his speech, Dr. Lamming describes the atmosphere surrounding the development of the directive in 1985 and the blatant disregard for science and trade concerns.