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# A U.S. PERSPECTIVE ON THE EC HORMONES DIRECTIVE

Holly Hammonds\*

## I. ISSUES

On December 31, 1985, the European Community ["EC"] adopted the "Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action" ("the Directive").<sup>1</sup> The directive, originally scheduled to take effect on January 1, 1988, prohibits the use of hormones, natural and synthetic, in livestock production and the sale of meat treated with hormones in the EC market.<sup>2</sup> The United States believes that the directive violates the requirements of the Agreement on Technical Barriers to Trade ("Standards Code" or "Code").

## II. HISTORY OF THE CASE

Since EC adoption of the directive, the United States repeatedly has protested its enactment and enforcement, both within the framework of the Standards Code and bilaterally outside of the Code.

In January 1987, the United States requested consultations on the directive under the provisions of the Standards Code,<sup>3</sup> and consultations took place in February and April of that year. Because no mu-

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\* Associate General Counsel, Office of the United States Trade Representative. This paper is intended to provide a brief sketch of the evolution of a U.S. perspective on the EC hormones directive as of Fall 1989. Given the ongoing nature of the dialogue between the concerned parties, positions may have shifted somewhat in the period prior to publication. This paper does not necessarily represent the views of the U.S. government and should not be construed as a "response" to the preceding article by Werner P. Meng.

1. *Council Directive 85/649 EEC prohibiting the use in livestock farming of certain substances having a hormonal action*, 28 O.J. EUR. COMM. (No. L 382) 228 (1985). Together with two other Directives, *Directive du Conseil 72/462/CEE concernant l'importation d'animaux des espèces bovines et porcines et des viandes fraîches en provenance des pays tiers*, 15 O.J. EUR. COMM. (No. L 302) 28 (1972), and *Council Directive 86/469/EEC concerning the examination of animals and fresh meat for the presence of residues*, 29 O.J. EUR. COMM. (No. L 275) 36 (1986) [superseded in part by Council Directive 89/227/EEC amending Directives 72/462/EEC and 77/99/EEC to take account of the introduction of public health and animal health rules which are to govern imports of meat products from third countries, 32 O.J. EUR. COMM. (No. L 93) 25 (1989)], the Hormones Directive sets out Community requirements concerning imports of fresh meat obtained from animals to which substances having a hormonal effect have been administered and concerning the presence of residues in fresh meat imported from third countries. The Directive was later revised to cover inedible meat and sheep exports.

2. Certain hormones used for therapeutic purposes are excepted.

3. Agreement on Technical Barriers to Trade, 23 O.J. EUR. COMM. (No. L 71) 29 (1980). Article 14.1 of the Code provides that "[e]ach party shall afford sympathetic consideration to

tual resolution of the issue could be reached during those consultations, in April 1987, the U.S. requested that the complaint be investigated by the GATT Standards Code Committee ("the Committee").<sup>4</sup>

The United States also requested a technical experts group ("TEG")<sup>5</sup> under the Standards Code, in order to challenge the EC's claim that the directive was a health measure. When the EC blocked this request, the U.S. offered a compromise proposal, suggesting that a Committee Panel and a TEG be simultaneously formed<sup>6</sup> to examine the applicability of Standards Code article 14.25 ("processes and production methods"). Article 14.25 provides that the dispute settlement procedures of the Standards Code be used "where a Party considers that obligations . . . are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products." The U.S. proposed that, if the Panel found that article 14.25 were applicable, a Trade Policy Panel be established<sup>7</sup> to resolve the issue. The EC rejected this compromise proposal.<sup>8</sup>

As a result of the EC's unwillingness to resolve the issue through the Standards Code, the President of the United States determined the EC prohibition to be a disguised barrier to international trade that was not supported by scientific evidence, and, on December 24, 1987, determined EC policy to be actionable under section 301 of the Trade Act of 1974, as amended ("section 301").<sup>9</sup> In response, the President proclaimed customs duty increases on certain EC products, but suspended the application of the additional customs duties for so long as

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and adequate opportunity for prompt consultation regarding representations made by other Parties with respect to any matter affecting the operation of this Agreement."

4. Article 14.2 of the Code provides, *inter alia*, that "[i]f any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded, by another Party or Parties, and that its trade interests are significantly affected, the Party may make written representations or proposals" on the matter. Article 14.4 provides, *inter alia*, that "[i]f no solution has been reached after consultations . . . the Committee shall meet at the request of any Party to the dispute . . . to investigate the matter with a view to facilitating a mutually satisfactory solution."

5. The request was made on July 15, 1987. Article 14.9 of the Code provides that "[i]f no mutually satisfactory solution has been reached . . . 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. . . ."

6. Under Arts. 14.4 and 14.9 of the Code.

7. Under Art. 14.14 of the Code.

8. Subsequently, at the request of the EC, the United States agreed to bilateral meetings on the issue, and three meetings were held in 1988. No meaningful progress was made.

9. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2364 (1975), as amended 19 U.S.C. § 2411 (Supp. VI 1988); Determination Under section 301 of the Trade Act of 1974, 3 C.F.R. 318 (1987).

EC Member States did not implement the ban in a way that created a barrier to beef imports from the United States. The President also delegated his authority to suspend or modify the duties to the United States Trade Representative ("USTR").<sup>10</sup>

On January 1, 1989, the EC was expected to apply the Directive to meat imports. As a result, on December 30, 1988, the USTR terminated the suspension of increased duties.<sup>11</sup>

On February 18, 1989, the U.S. and the EC set up a high level Beef Hormones Task Force to examine how to resolve the dispute, which at that point was disrupting almost \$200 million in two-way trade. As a result of the work of the Task Force, in May 1989, the two sides announced an interim step to allow U.S. producers of meat *not* treated with hormones to export such goods into the EC market, and to reduce U.S. retaliation to account for the amount of U.S. beef products shipped to the EC as a result of the interim pressure.<sup>12</sup>

Although the interim measure arguably prevented the further escalation of the dispute, the issue clearly remained unresolved. The majority of U.S. trade with the EC in this area (including most "variety meats," such as livers, tongues, and kidneys, which represent roughly eighty-five percent of trade in this area) was *not* covered by the interim agreement. In October 1989, the EC requested dispute settlement under the General Agreement on Tariffs and Trade (GATT) on the matter of U.S. retaliation under section 301.

### III. THE U.S. POSITION

The U.S. is convinced that the EC has violated its obligations under the Standards Code,<sup>13</sup> has frustrated the resolution of the issue

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10. Proclamation No. 5759, 52 Fed. Reg. 49,131 (1987) (increasing rates of duty on certain products of the European Community).

11. One product subheading was excepted, 9903.23.10 (sausage casing). Determination To Impose Increased Duties on Certain Products of the European Community, 53 Fed. Reg. 53,115 (1988). The USTR made this exception because of an EC decision *not* to enforce the Hormones Directives with respect to those meat products imported for use in pet food (known as the "Pet Food Derogation"). The EC and the U.S. also agreed, on January 12, 1989, to a grace period for goods entered before February 1, 1989, if certified for export before January 1, 1989. *U.S., EC Agree To Grace Period for Goods Already En Route in Hormone Ban Dispute*, 6 Int'l Trade Rep. (BNA) 66 (1989) (announcement by USTR, Clayton Yeutter).

12. United States Trade Representative Carla A. Hills, Agriculture Secretary Clayton Yeutter, EC Vice President Frans Andriessen, and EC Agriculture Commissioner MacSharry participated in the finalization of this measure.

13. At a minimum, the U.S. believes that the Directive violates article 7.1 of the Standards Code which specifies that certification systems shall not have the effect of creating unnecessary obstacles to international trade. The U.S. also believes that its national treatment rights have been violated by the EC action. Article 7.2 of the Code obligates the EC and its Member States to ensure that meat imported from the U.S. is treated no less favorably than meat of national origin.

through the internationally-accepted dispute settlement procedures of the Standards Code, and has unfairly denied U.S. beef access to the EC market. The EC has also repeatedly blocked the formation of a TEG to resolve the issue.<sup>14</sup>

The U.S. believes that the directive is not based on valid scientific evidence and constitutes an unjustifiable restriction on trade. Indeed, the U.S. cites the preponderance of scientific and technical evidence (including European studies) indicating that the meat of animals treated with growth hormones is not dangerous to human health.

Moreover, the EC insistence that amendment of the original hormones directive is "politically infeasible" is not an acceptable argument under either the Standards Code or broader GATT law. In deference to EC wishes and political concerns, the U.S. has tried to resolve the issue less formally in bilateral discussions. In this case, however, where the EC refuses to allow the dispute to be resolved under applicable international law, the U.S. has determined, in accordance with U.S. law, that it is necessary to respond with an equivalent tariff increase.

The United States has promised to reduce its retaliation to the extent that the EC reduces its embargo on meat imports.<sup>15</sup> Still, the United States believes it is clearly inappropriate to allow the formation of a panel to address U.S. retaliation under section 301 when the EC has for years blocked the U.S. request for a panel under the Standards Code.

#### IV. CONCLUSION

The hormones dispute is politically charged and difficult to resolve. The U.S. legal position is clear. Pursuing its conviction that the directive is in violation of important international obligations, the U.S. has

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14. The United States believed and continues to believe that a TEG should have been formed, once requested by the U.S. side. Article 14.25 of the Standards Code is unambiguous: "The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products." There is no requirement in the Code for Committee consensus on the fact of circumvention. Article 14.8 further provides that "[d]uring any phase of a dispute settlement procedure including the earliest phase, competent bodies and experts in matters under consideration may be consulted and invited to attend the meetings of the Committee; . . . ."

15. The U.S. removed from the retaliation list pork hams (valued at approximately \$300,000 per year) in July, 1989. Modification to the Determination to Impose Increased Duties on Certain Products of the European Community, 54 Fed. Reg. 31,398 (USTR 1989). In December, 1989, tomato sauce (valued at approximately \$4 million per year) was also removed in response to increased U.S. meat exports to the EC. Further Modification to the Determination to Impose Increased Duties on Certain Products of the European Community, 54 Fed. Reg. 50,673 (USTR 1989).

protested EC hormones policy since the 1985 adoption of the directive, both in bilateral consultations and in the context of the Standards Code, and has formally requested talks with the EC under the Standards Code. In deference to EC political concerns, and in spite of a U.S. preference for resolution under appropriate Standards Code procedures, the U.S. government has been willing to attempt to reach a fair compromise. Unfortunately, so far, a solution satisfactory to both parties has not emerged.