

GENERAL AGREEMENT ON TARIFFS AND TRADE

Multilateral Trade Negotiations

Group "Agriculture"

MAJOR POINTS AND OBSERVATIONS MADE ON THE
APPLICABILITY OF THE DRAFT STANDARDS CODE TO AGRICULTURE

Note by the Secretariat

1. At its meeting of 29 to 30 March, Group "Agriculture" requested the secretariat to prepare a note, on its own responsibility, setting out the major points and observations made during the meeting on the subject of the applicability of the draft standards code to agricultural products.
2. The present note has been prepared in response to the Group's request. It attempts, in the first part, to record the major points and observations of a general nature made in the discussion. The second part shows the points and observations related to particular chapters or sections of the draft code.
3. The paragraphs below aim to reflect the views expressed by one or more delegations and do not necessarily represent a consensus of the Group. The note may not be exhaustive of all the points made.

General observations

The following were among the general observations made by delegations:

1. The draft standards code is still being evolved, and a number of points remaining to be settled will have a bearing on the question of application of the code to agricultural products.
2. Among the substantive issues to be settled are those relating to special and differentiated treatment for developing countries. These issues would equally apply to agricultural trade if it were covered by the code.

3. Delegations recalled that they had participated in the elaboration of the code on the hypothesis that its coverage would not necessarily be restricted to industrial products, and without prejudging the question of its applicability to agricultural products.

4. It was stated that the intention of the code was to reinforce the principle that standards and similar technical regulations should not be introduced or maintained as barriers to trade, and that this principle should apply to industrial and agricultural products.

5. It was suggested that the draft code should be examined to see whether it can cope with problems met with in agricultural trade. Account should be taken of past experience in solving such problems.

6. Some delegations considered that the draft code can adequately deal with problems arising in agricultural trade without revision. Some delegations thought that additional provisions might be required to enable agricultural trade problems to be dealt with adequately. The observation was also made that practical difficulties could arise in applying the code to agriculture and that these must be taken into consideration by the Group.

7. Some delegations said that the right of countries to implement measures for the protection of human, animal or plant life and health, environment or national security, or for the prevention of deceptive practices must be recognized. Some delegations added that participants must have freedom to decide whether certificates given by others are acceptable; to use test methods which they deem fit; and maintain the freedom to be selective in relation to food (or food standards), animal and plant life from any source. The observation was made that legitimate concerns of these types were adequately dealt with in the draft code.

8. It was suggested that the contents and scope of the draft code should be examined in the light of existing rules and provisions of the General Agreement.

9. It was recalled that the draft code should not hamper or interfere with other multilateral or bilateral efforts pursuing similar aims.

10. Some delegations said that before a policy judgment could be made whether or not the present draft code should apply to agriculture, there should be a greater understanding and appreciation of the technical and administrative implications of the code.

Points related to particular Chapters or Sections of the Draft Code
(MTN/NTM/W/71 and 93)

The following were among the points made by delegations in relation to the Chapters or Sections indicated:

Preamble

As stated in the footnote, the text is of an indicative nature only, since the preamble in its definitive form would need to reflect the final juridical status and content of the instrument. In view of this, some delegations reserved their position on the matter.

Some delegations said that the preamble might need to be replaced by precise objectives. The links with the General Agreement should be shown.

In the view of some delegations certain parts of the text indicate that the preamble is not adapted to agriculture.

Second
Considerandum

Some delegations doubted that the phrase "improving efficiency of production" could apply to agriculture.

Fifth
Considerandum

It was pointed out that the text draws on part of GATT Article XX(b) and adds further elements. Account should also be taken in the preamble or the body of the code, of Article XI:2(b) which has agricultural aspects.

It was suggested that safeguard provisions should be incorporated in the body of the code rather than in the preamble.

More specifically, it was suggested that such provisions might be incorporated in Section 2(b), along the lines suggested in MTN/NTM/W/72, but should also be considered in relation to Sections 4(c) and 20.

Some delegations said that safeguard provisions should allow action to be taken when problems exist as well as when they threaten to arise.

Chapter I. Terms

The discussion of this Chapter was based on Annex I of document MTN/NTM/W/93.

Some delegations reserved their position on this Chapter.

Some delegations said that the terms and their definitions are of a general and technical nature and do not require any specific adaptation to take account of agricultural aspects. Some other delegations considered that certain terms and definitions would need to be adapted to take account of agricultural aspects.

It was pointed out that the text makes reference to definitions established by the ISO which does not normally deal with agricultural matters. When the scope and coverage of the code became clearer it might be necessary to include certain definitions used by bodies which deal with agricultural standards, such as the International Office of Epizootics.

Appropriate definitions would need to be included if it is decided that the code should also cover processing and production methods.

Chapter II. Operative provisions

A. Technical regulations and standards

Section 2

It was pointed out that technical regulations and standards relating to agricultural products often differ from those on industrial products in a number of aspects:

- Regulations on industrial products usually take account of such elements as quality of product, performance, safety or dimensions, while those on agricultural products are more frequently based on criteria such as shape, density, colour, appearance, flavour or fitness for processing.
- Regulations and standards for agricultural products vary from country to country, depending, among other things, on dietary patterns, consumption habits, health and sanitary requirements, prevalence or absence of particular diseases and vectors, as well as conditions of production and marketing.

Section 2
(cont'd)

- Regulations and standards relating to unprocessed agricultural products, whose characteristics highly depend on natural conditions such as climate, weather or soil, are frequently adopted only for purposes of product grading or classification. In certain countries the grading or classification is carried out not according to absolute criteria but in relation to a sample of the product of the crop year concerned.
- Whereas industrial standards tend to be more precise and static, the development and application of agricultural standards is an ever-changing process. This aspect should be taken into account by the safeguard provisions so as to enable participants to operate within them.

The observation was made that many of the issues raised also apply to industrial products, e.g. pharmaceuticals.

Some delegations, while recognizing that animal and plant quarantine systems must not be operated as a disguised or unnecessary trade barrier, expressed doubts as to whether the draft code, or some of its key provisions, were appropriate to such systems. They recalled that quarantine systems served the specific purpose of controlling pests and infectious diseases transmissible by plants, animals or their products, and of preventing their introduction into a given country as well as their spread across national boundaries. The systems were adapted to conditions prevailing in individual countries which might differ as to geography, environment, history of plant and animal diseases, scientific approaches and expectations regarding standards, or the rôle of agricultural trade in the economy.

It was stressed that the draft code should avoid duplication of the activities of other bodies, and that it should also avoid establishing obligations which would duplicate or conflict with obligations existing in other bodies or instruments, such as the Codex Alimentarius, the International Zoo-sanitary Code, or the International Plant Protection Convention.

Some delegations pointed out that the draft code related to trade and its objective was to facilitate international trade. It did not aim to duplicate the work in other fora, but to strengthen and encourage it. It was also suggested that the draft code should, where necessary, seek to complement the activities and obligations existing in other bodies or instruments.

Section 2
(cont'd)

It was suggested that the section as a whole should be examined in the light of rules, obligations and practices existing in other relevant bodies.

It was also suggested that appropriate account should be taken of the obligations existing under the General Agreement itself with respect to the technical regulations and other measures covered by the draft code; and that additional clarification might be needed in this area.

It was pointed out that standards on agricultural products tended to be mandatory and would, according to the definitions in the code, fall under the provisions of this section. The view was further expressed that the provisions of this section are mandatory and fall under the provisions of GATT Article III.

Some delegations considered that the General Agreement had not functioned adequately for agricultural trade, and that the code should be an instrument separate from it.

Some delegations suggested that in view of the application of the code to agricultural trade, which is of major importance to developing countries, the code should provide for differentiated treatment for such countries. Consideration should be given to the inclusion of a specific paragraph which would provide that adherents to the code shall by all means ensure that technical regulations and standards and their application, test methods and certification systems shall not create obstacles to exports from developing countries; and that they will endeavour to facilitate exports from the developing countries through methods which would permit these countries to meet and conform to reasonable standards appropriate to their structural situation.

Some delegations said that this section contained specific safeguards as regards the preparation and use of technical regulations which deviate from international standards, or which are taken in emergency situations. General safeguards can only serve as a rough benchmark, and might not adequately cover the commitments in this section. Each commitment entered into should specify the exceptions or safeguards related to it.

Section 2
(cont'd)

Some delegations stressed that technical regulations and standards should be applied impartially as between imports and domestic production. They suggested that the code should cover this principle in all aspects, and not only in relation to testing.

It was suggested that the code might need to make a distinction between standards relating respectively to manufactured food; to animal and plant health; and to the processing of agricultural products.

2(a)

It was pointed out that in many cases, regulations introduced in order to protect human, animal or plant health are by their very nature barriers to trade. This may need to be taken into account when assessing the utility of the draft code's basic commitment not to introduce or maintain technical regulations as trade barriers.

It was suggested that the code should include the concept that technical regulations and standards should not be more severe than necessary.

The following comments were made on the term "unnecessary": GATT Article XI:2(b) permits recourse to restrictions if they are necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade. The code provides that technical regulations and their application should not act as unnecessary obstacles to international trade. There is thus a symmetry of obligations which reinforce each other. Similarly, there is a mutual reinforcement between the provisions of GATT Article XX:(b) and (d) and those of the draft code. Although the exact legal relationship between the obligations under the code and GATT may need to be clarified, the draft code gives greater precision to certain commitments under GATT (in particular Articles III, XI and XX) and imposes some additional obligations regarding publication, notification, etc. It is, however, not incompatible with the GATT.

Some delegations said that the establishment and maintenance of agricultural standards, and the applicability of the code to them, need to be considered in relation to the country of export as well as to the country of import. For example, an importing country's regulations which tolerate residues of substances effective against disease vectors prevalent in that country should not prohibit residues of substances used to combat specific vectors in the exporting country. The code should adequately cover cases of this kind.

2(b)

It was suggested that greater precision should be given to the following expressions, taking account of practices in other fora:

"where ... international standards exist or their completion is imminent": it is not clear which stage of acceptance or of completion is meant.

"relevant parts": a basis would be required for determining which parts are relevant.

"inappropriate": the interpretation involves elements of judgment.

It was also suggested that the term "international standards" required further specification, so as to clarify whether or not it also covered standards established by a group of countries in the light of their own situation, and regional standards, such as those established by the ECE.

Concern was expressed that the exception provided for in the last phrase of the paragraph might open the way to abusive use of health and sanitary restrictions. Reference was made to the proposal for additional wording (MTN/NTM/W/72, page 4).

The question was raised whether possible inconsistencies in obligations might not arise, for instance, in connexion with the Statutes of the Codex Alimentarius Commission which provide for three degrees of acceptance of a standard by a country. The point was made that the draft code should not impose on an adherent obligations beyond or inconsistent with those devolving from the degree of acceptance of a standard by him.

Other delegations said that the paragraph was compatible with and encouraged the efforts of the Codex Alimentarius and similar bodies, by providing that adherents shall use international standards. The existence of various types of acceptance under the Codex presents no problems: If there is full acceptance of a standard, an adherent to the code would use it. Target acceptance implies use in due course. Partial acceptance is covered by the words "relevant parts of them ... except where such international standards or relevant parts are inappropriate for the adherents concerned". The non-accepted parts of a Codex standard would presumably be those which the adherent considered inappropriate and the code would therefore place no obligation on him to use them. There might however be an onus on the adherent to show why he considered an international standard or part of it to be inappropriate.

2(b)
(cont'd)

Some delegations said that one of the basic premises of the code was that in the areas which it was to cover, standardization was desirable and, by implication, possible. It was doubtful, however, whether international standardization was practically possible in the area of quarantine systems. There were no international standards covering animal quarantine. As regards plants, the International Plant Protection Convention did not provide a framework for the establishment of international standards, and in its Article VI.1 recognized that "contracting governments shall have full authority to regulate the entry of plants and plant products". Thus, in areas not susceptible to international standards harmonization, the obligations incumbent upon adherents to the proposed code would be significantly more onerous than in areas where international standards existed or were possible. (See also under 2(c) below.)

Some delegations said that the code should not exclude any aspect of international standards. The question of whether or not international standards are feasible in a given area is not a matter for subjective judgment but for examination in the appropriate technical bodies.

Some delegations pointed out that at present, an exporter wishing to sell is forced to comply with the technical regulations maintained by the importing country, and these may be based on national or regional standards even though international standards exist. It is more difficult for the agricultural than for the industrial exporter to adjust to an importer's requirements which deviate from an international standard. The draft code should include a rule prohibiting deviations from international standards that would create a trade obstacle which for reasons of natural conditions prevailing in the exporting country could not be overcome.

2(c)

It was pointed out that also this paragraph, by encouraging participation, strengthens the work in bodies such as the Codex Alimentarius Commission.

In relation to paragraphs 2(b) and 2(c) it was also pointed out that there is no obligation to work towards international harmonization of standards in a particular area (such as quarantine) where no international standards exist unless countries agreed that international standards in that area were needed, and took the necessary steps in an appropriate international standardizing body. As long as this is not the case, there is no potential conflict of obligations.

Some delegations said that countries which cannot participate in the work of standardizing bodies cannot be obliged to accept their conclusions.

2(d)

Some delegations considered that the paragraph required further explanation or redrafting so as to take account of agricultural trade in general. Among the questions raised was whether certain characteristics of agricultural products (which frequently depend on climatic, soil and other natural conditions in the producing country) should be regarded as falling under "performance" or "design". The observation was made that characteristics such as, for instance, colour, shape or taste could be regarded as reflecting the quality of a product, and technical regulations based on them would fall under the provision of this section.

It was suggested that if the code is to ensure that technical regulations are not used in a way which constitutes an unnecessary barrier to trade, it should cover not only regulations which relate to products but also those that relate to processes and production methods.

Some delegations said that processing and production methods should be brought within the scope of the code only to the extent that they could be used as a way of denying the benefits that might otherwise be derived from the code.

Some delegations pointed out that the inclusion of processing and production methods would have far-reaching consequences for several operative provisions of the code, and might present problems difficult to overcome. One of these might be the question of how to determine which processes and regulations would still affect the characteristics of the end product. It might be useful to compare how processes are dealt with in the Codex Alimentarius, where they are treated in conjunction with Codes of Practice rather than with standards.

2(e)

It was suggested that the notification procedure should not apply to regulations relating to products which are peculiar to the consuming country and do not significantly enter into international trade, nor should it apply to changes in regulations where such changes have only a minor effect on the import trade of adherents.

It was pointed out that the words "substantially the same" are difficult to define and might lead to undue avoidance of obligations. Reference was made to a proposal for an additional paragraph that would provide for notification of technical regulations substantially based on international standards (MTN/NTM/W/72).

2(e)
(cont'd)

Some delegations said that applying the draft code's notification procedures to food and agriculture might lead to insurmountable technical and administrative difficulties, given the vast number of regulations in the areas concerned, and the continuous revision and modification of the regulations in the light of changing scientific knowledge. Account should be taken of notification obligations existing in relation to other international bodies or instruments. The notification procedures in the draft code might therefore provide that, to the extent appropriate, the relevant obligations could be met through the exercise of obligations in other bodies.

There was some discussion of whether or not the provisions of paragraph 2(e) duplicated or conflicted with obligations regarding exchange of information, notification and consultation existing in other bodies. Some delegations were of the view that there was a certain risk of such duplication or conflict. They pointed out that, for instance, a country deviating from a Codex Alimentarius standard would have to inform both the Codex Commission as well as notify under paragraph 2(e) of the draft code. It was also pointed out that under the International Zoo-sanitary Code and the International Plant Protection Convention, systems for the exchange of information relevant to quarantine matters had already been established.

Other delegations pointed out that the Codex requires notification only in the case of other than total acceptance of a standard. There are no provisions for prior notification or for consultation. There is thus no duplication between the provisions of paragraph 2(e) and the Codex. More generally, the paragraph as it now stands does not appear to create risks of duplication with notification and similar obligations in other fora. It applies only to regulations the content of which is not substantially the same as that of international standards, i.e. those dealt with in other fora. Subparagraph (i) requires only the publication of a notice that a regulation is being prepared; Subparagraph (ii) the notification of the products to be covered by the regulation, and its objective. Subparagraph (iii) provides for information to be given upon request by another adherent; a request would hardly be made for information which would duplicate that already in an adherent's possession. Subparagraph (iv) does not deal with notification as such. While the provisions of this paragraph thus do not seem to conflict with obligations elsewhere, the likely frequency of notification and the resulting administrative implications might need to be considered.

2(e)
(cont'd)

Some delegations said that because of the general absence of international standards in the area of quarantine, the obligations under this paragraph would apply to all quarantine measures, all or nearly all of which are mandatory. The code as drafted thus establishes a complex and onerous new set of obligations in this area. No commitments exist in the General Agreement comparable to those in this paragraph.

2(f)

The observation was made that the wording allows any or all steps of 2(e) to be omitted, but in order to enable the remaining part of 2(f) to be fulfilled, the relevant information must be given to the other adherents.

Some delegations said that if quarantine regulations were to be brought within the scope of the code, emergency action in the area of quarantine would be covered by this paragraph, whereas existing permanent quarantine regulations would appear not to be covered by any provisions of the draft code. Other delegations commented that the question of whether or to what extent quarantine regulations should or could be brought within the scope of the code is yet to be decided upon. The question of application to existing regulations relates to section 20 of the draft code.

2(g)

The comment was made that the obligation to publish technical regulations is related to the provisions of Article X of the GATT.

Section 4

It was noted that many comments made in respect of Section 2 also applied to this section, which deals with standards, i.e. non-mandatory technical specifications.

It was suggested that any ambiguities resulting from the differing usage of the term "standard" in the industrial and agricultural sectors would need to be removed through the adoption of adequate definitions in due course.

B. Conformity with technical regulations and standards

Section 5

It was suggested that in view of the definitions at present agreed (MTN/WTM/W/93), the question of whether this section is still necessary will need to be reviewed. As the definition of "technical regulation" now includes the applicable administrative provisions, certain parts of this section could be subsumed under Sections 2 and 4 provided they are adequately covered by them, others (such as 5(b)) could be included in Section 6, or left to stand in this section.

5(d) It was suggested that the term "practicable" may need further specification.

Some delegations said that importing countries may wish to reserve the right to carry out testing procedures in their own territory because foodstuffs can deteriorate during transport after testing has taken place, and because the same testing methods may produce different results in different laboratories. Some delegations added that in the field of quarantine, it is established practice to carry out tests in both the exporting and importing countries, and that, furthermore, a certification system such as envisaged in the draft code is not a practice known in relation to animal or plant quarantine.

Section 6 It was suggested that section 6 should be reviewed as certain of its provisions raise specific problems for agricultural trade.

6(a)(ii) The observation was made that the term "certification bodies" presumably means bodies of central governments, but importers should not interpret the term restrictively in practice, and should also accept certificates provided by other bodies in the territory of the exporting adherent.

6(b) It was suggested that the problem of testing of perishable foodstuffs or other goods liable to deteriorate in transit might be covered by paragraph 6(b) which provides for alternatives to the provisions of 6(a). Importers are naturally interested in the state of goods upon arrival, and the problem should be given further thought.

It was also suggested that the text should be completed in the light of the provisions of GATT Article XX which contains the concept of "countries where the same conditions prevail", which is not covered in 6(b).

6(b)(i) It was suggested that the term "similar products" should be defined for the purposes of the draft code. (Also applies to 9(c).)

It was pointed out that an importing adherent might not need to test in his territory products grown in a country applying the same domestic sanitary legislation as is applied in his own territory (e.g. with respect to pesticides). He might, however, find it necessary to test products grown in a country where sanitary legislation differs. The meaning of "similar product" should not be construed so as to imply that discrimination has thereby occurred.

C. Certification systems

It was pointed out that certain codes or agreements (such as the International Plant Protection Convention) contain provisions on certification, including in some cases the harmonization of certificates. The code should avoid conflict or duplication with the obligations or practices under existing certification systems, including regional systems.

Chapter III. Other provisions

It was noted that a number of proposals regarding this chapter were still on the table.

It was considered that the provisions of this chapter could more fruitfully be discussed when the likely content, coverage and juridical status of the code were better known.

Some delegations said that among the questions to be considered in relation to this chapter were the ability of the code to solve the problems encountered in agricultural trade in the area of standards and technical regulations; the possible need or otherwise for provisions going beyond the scope of the envisaged code; and the existence of other means or mechanisms for solving such problems.

Section 21

Some delegations pointed out that although procedures for bilateral or multilateral consultations already exist in the framework of GATT, the draft code provides for consultation on the specific question of whether or not a technical regulation operates as an unnecessary trade barrier. If the consultation shows that the regulation does operate as an unnecessary barrier, any refusal to dismantle it might usefully be tested in the GATT.

Some delegations said that procedures for dispute settlement in the sensitive areas of human, animal and plant health, environment, public safety and national security would have fully to reflect widely differing national expectations as regards the rôle and purpose of standards and regulations in these areas, and recognize that international standards are unlikely to play the same rôle or act as the same points of reference as they may do in the industrial area. Furthermore, consultations on agricultural regulations are more likely to enter the sphere of scientific argument, in which the scope for legitimate disagreement is extensive and must be recognized.

Section 21
(cont'd)

Some delegations said that dispute settlement is likely to be complex and should preferably be carried out by a small and appropriately qualified panel, as envisaged in certain proposals to amend Section 19 of the draft code.

Some delegations doubted whether the consultation or dispute settlement procedures as envisaged or proposed under the code would be practical or adequate in the area of quarantine measures. The question of sanctions or permissible counter-measures as part of dispute settlement would create particular problems. Procedures for exchange of information and explanation, where appropriate, would represent a more practical approach.