RESTRICTED

DPC/C/W/32
16 March 1987

Special Distribution

GENERAL AGREEMENT ON TARIFFS AND TRADE

International Dairy Arrangement

PROTOCOL REGARDING CERTAIN CHEESES

Interpretative Statement by New Zealand Concerning Article 7:2

Note by the Secretariat

1. At the twenty-eighth session of the Committee of the Protocol Regarding Certain Cheeses in December 1986, a request was made to the secretariat to prepare a note on legal aspects of changing an interpretative statement by New Zealand concerning the application of Article 7:2 of the Protocol. It was stressed that such a note might merely aim at providing the Committee with some background information which might be of some help to the Committee when pursuing its consideration of the matter.

2. The matter has been subject to discussion in the Committee since June 1986, and the records of those discussions are found in documents DPC/C/40 (paragraph 5), DPC/C/41 (paragraphs 8 to 9), DPC/C/42 (paragraph 8), DPC/C/43 (paragraph 5) and DPC/C/44 (paragraphs 9 to 16). In December 1986, New Zealand made a formal request to the Committee requesting it to agree that the Interpretative Note contained in the Appendix to the Protocol be amended to read:

> "New Zealand has indicated that the annual quantities of its exports under Article 7:2 of the Protocol Regarding Certain Cheeses should normally be in the order of 4,000 metric tonnes and could, in exceptional circumstances, amount to some 5,000 metric tonnes." (DPC/C/W/31)

However, divergent views were expressed, and it was decided to revert to the matter at the March 1987 meeting of the Committee.

3. The arguments advanced by New Zealand, when presenting its request, were that its total cheese production had, since 1979, increased from 85 thousand tons to 130 thousand tons, the range of cheese specifications manufactured had increased from 19 to 41 and consequently the volumes of aged, redundant and off-specification cheese had grown. Furthermore, the bulk of New Zealand cheese was produced for export and this was the only outlet for aged and redundant cheese.

4. While some participants were not, in principle, opposed to joining in an agreement along the lines suggested by New Zealand, others expressed reservations in that respect. Most participants wanted to seek further instructions from their respective authorities. Those who could not

initially agree to the New Zealand suggestion, stressed that New Zealand had made extensive use of the derogation and that this might have had price-depressing effects in some markets. The exceptional nature of the sales was questioned as the exception seemed to have become routine. They considered the limit of 2,000 tons to be a commitment which could not be changed unilaterally, as doing so would modify the balance of rights and obligations on which the Arrangement was originally based. Concern was also expressed with defining small quantities as a certain percentage.

5. It should be made clear that in such a situation, the secretariat should not be expected to express an opinion as to a possible legal interpretation of the aspects under consideration. Any participant would have the right to express his own interpretation of the provisions of the Arrangement, and whatever is expressed or suggested in the following should be considered merely as possible points for discussion and should in no way prejudice the position of any participant, nor be taken to constitute an authoritative legal opinion of the secretariat. The comments should be considered as merely very preliminary ones, and the secretariat would be willing to make further comments at later stages of the discussion if that might become desirable.

6. Article 7:2 of the Protocol Regarding Certain Cheeses was originally proposed by New Zealand as an addition to the Draft Protocol which was proposed by Australia. In proposing the addition, New Zealand provided some rationale for having a safeguard clause of this type in the Protocol, but no systematical records were made of the discussions of this. In order to make this specific proposal more acceptable to other negotiating parties and finally reach an agrement on the text of the Protocol, New Zealand offered its interpretation of what might constitute a small quantity in its case, in the form of the note in question.

7. While the other interpretative statements in the Appendix are clearly reservations which may be lifted unilaterally at any time, the New Zealand statement seems to imply both a reservation and a commitment. It seems that New Zealand has clearly reserved its right to export up to 2,000 tons of low-quality cheese at a price below the minimum agreed and at the same time committed itself, or promised, not to exceed that limit. The statement might, however, also be considered merely as a declaration of intent, as the tense of the verbs are kept in conditional and might consequently have to be read and interpreted in light of the situation as it existed at the time the negotiations were concluded and in light of the use made of the derogation so far.

8. A commitment which may even amount to a concession, cannot be changed by a participant unilaterally, as a change would normally require the consent of the other participants in the Arrangement or the Protocol and would entail a reconsideration of the resulting effect on the balance of rights and obligations. A decision of the Committee adopted by consensus, if necessary accompanied with reservations by other participants, would seem to be a workable procedure. However, a draft decision would have to be negotiated, as well as any related conditions and in doing so, all possible alternative ways of dealing with the problems should be explored.

9. A declaration of intent, which may in its conception have been rather conditional, and based on circumstances as they appeared at the time the declaration was made, could be expected to be amended in order to take

account of substantially changed circumstances or unforeseen developments and taking into consideration the various reasons for maintaining a safeguard clause like the one in question. This could imply that a given figure would constitute nothing but an illustration and that it would anyhow be left to the Committee to determine what might be acceptable as "small quantities" on a case-by-case basis. It seems reasonable though, that the Committee would have to accept, by consensus, as valid the evidence provided to show that circumstances have changed and also accept that any new limits suggested are in proportion to any previously applied ones. It might be appropriate to consider whether any decision by the Committee along these lines and concerning a declaration of intent, should be accompanied with clauses with regard to aspects such as periodical reviews, duration or phasing out. Quite another aspect would be if an extensive use of a derogation as provided for in Article 7:2, might entail a formal complaint that sales under the derogation might have caused prejudice or a threat of prejudice to the interests of another party. In that situation, it could be argued by the complaining party that sales under derogation, at a heavily discounted price, might imply the granting of a subsidy, or an element of subsidies, in terms of Article XVI of the General Agreement, and it might consequently be claimed that the provisions of that Article as well as those of the Subsidy Code would apply. This would entail a consideration of whether the criteria of "more than an equitable share" (Article XVI:3) or "price undercutting" (Article 10:3 of the Code) were complied with. In brief, it appears obvious that both quantitative and price aspects would have to be taken account of when discussing the appropriateness and effects of sales under derogation.

10. It might finally be useful to keep in mind that a minimum of safeguard clauses, or loop-holes are imperative to the effective operation of any commodity arrangement, and that the lack of loop-holes or the absence of safeguard clauses has caused difficulties in the past, e.g. for the operation of the Protocol Regarding Milk Fat. Under the International Dairy Arrangement three major groups of criteria may qualify for derogation from the price provisions of the Protocols, i.e.: difficulties caused to certain participants; disposal of products of an inferior quality; and particular end-uses, notably food aid and feed. Perhaps more attention should be devoted to a more flexible or extensive use of derogations granted upon specific request, i.e. an Article 7:1 type of derogation. This might better enable the Committee to determine with greater precision the actual need for allowing sales under derogation, better control the volume of such sales, as well as the prices at which they are made, and perhaps ensure an equitable repartition of the use of derogations among participants.

MEMORANDUM

To: To All Participating Members of the MFA

From: M. G. Mathur
Chairman
Sub-Committee on Adjustment

1. The Sub-Committee on Adjustment, in its report to the Textiles Committee in March 1986, concluded that, in any future work, "consideration should be given to substantial improvements in the quality and range of data and information collected as well as the identification of criteria for assessing the extent to which the provisions of Article 1:4 were being implemented... Some of the possibilities reviewed included a re-orientation of the type of information being sought, with greater emphasis being placed on identifying the results of government programmes and on determining the specific measures adopted autonomously by industry, particularly developments in individual sectors or product lines. It was considered that this would require drawing on additional sources of information to complement the data provided through the submissions, including the possibility of independent contributions by the Secretariat."

2. Bearing in mind the above conclusions of the Sub-Committee and having due regard to the provisions of Paragraph 19 of the 1986 Protocol extending the MFA, I anticipated, in my report to the Textiles Committee in December 1986, that "the Sub-Committee would begin its activity early in 1987, to organize its work and to consider how best to achieve the objective of a more comprehensive report to the Committee, and what additional material and information or supporting analysis it could expect from the Secretariat." In that respect, I invited participants to "give some thought to the additional information that could be provided and how the questionnaires, used in the past for collecting information, could be improved."

3. Accordingly, on 11 March 1987, the Technical Sub-Group of the Sub-Committee on Adjustment met and developed the attached document, which comprises: (a) a set of general guidelines; (b) Questionnaire A seeking information on autonomous adjustment processes and government policies and measures relevant to Article 1:4; (c) Questionnaire B seeking information on recent developments in production and trade in textiles and clothing as well as measures to facilitate adjustment in these industries, relevant to Article 10:2; and (d) a set of forms for the reporting of statistical data (Annex A).

4. To expedite the preparation of the submissions, the questionnaires are being sent forthwith. The Secretariat will undertake to fill in the statistical forms in Annex A, to the extent possible, and forward them to participating countries by the end of March 1987 for verification and inclusion of such additional statistical data as may be required.

5. Accordingly, participating countries are requested to make their submissions available to the Secretariat as early as possible and, in any event, not later than 30 June 1987.

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