

GENERAL AGREEMENT ON TARIFFS AND TRADE

Multilateral Trade Negotiations

GROUP 3(e) - WORK ON TASK 15

Some Aspects of the Applicability of the Draft Code on Standards to Agriculture

Note by the Secretariat

1. The present note has been prepared by the secretariat for the convenience of delegations in further considering the task assigned to Group 3(e) under item 15 of the Programme of Work adopted by the Trade Negotiations Committee on 7 February 1974 (MTN/2), namely, "continuation of the studies already begun on sanitary and phyto-sanitary regulations". The object of this note is to outline some aspects of the applicability of the proposed code on standards to such regulations, a subject to which several members referred during the discussion on task 15 at the July meeting of Group 3(e) - (MTN/5, paragraphs 41 to 47). In general the note deals with the code's treatment of standards and the determination of conformity with standards.
2. It will be recognized that many of the questions involved in any examination of the code's applicability are technical in nature. There are nonetheless a number of general aspects which can be raised at least in a preliminary manner and bearing in mind that the proposed code is one of a number of possible approaches to the problem of the adverse trade effects of sanitary and phyto-sanitary measures.
 - A. Applicability and some alternatives
3. As presently drafted the proposed GATT codes makes no distinction between standards according to whether they relate to one type of product or another. Certain provisions of the Code could be regarded as having in practice a particular bearing on standards affecting agricultural products, but these and the other provisions of the code are of general application to standards as defined in the code. Thus, one of the main issues to be considered in any examination of the code's applicability is whether it is an effective method of dealing with the adverse trade effects of sanitary

and phyto-sanitary measures. If not, then what changes need to be made to enable it to apply effectively to such measures? Or, would some other approach be more effective and appropriate?

4. There are a number of alternatives: a specific code dealing with standards affecting agricultural products including sanitary and phyto-sanitary measures could be worked out which could either come under the jurisdiction of the "Committee for the Prevention of Technical Barriers to Trade" envisaged in Article 19 of the proposed code, or which could be established as a self contained code. The latter approach could have certain advantages if it were to be considered that the arbitral or consultative procedures envisaged in section 21 of the code were not sufficiently specific to deal, *inter alia*, with specialized questions relating to sanitary and phyto-sanitary regulations.

5. On the other hand the power conferred on the Committee for the Prevention of Technical Barriers to Trade under Article 21, as it is presently drafted,¹ to consult with any contracting party or with any competent body as part of its investigation of any matter referred to it, may be adequate to deal with such specialized questions. It may be that sanitary and phyto-sanitary matters could be dealt with separately leaving the code to cover the many other aspects of standards which affect agricultural products in the same way that industrial products would be covered. Another approach would be to deal with the adverse trade effects of sanitary and phyto-sanitary regulations on an individual or product by product basis.

B. Some apparent limitations on the code's applicability to sanitary and phyto-sanitary measures

6. In order for a particular sanitary or phyto-sanitary measure to be covered by the code it must come within the meaning of "standard" as that term is defined in the code, viz:

"The term standard means any specification which lays down some or all of the properties of a product in terms of quality, purity, nutritional value, performance, dimensions, or other characteristics. It includes, where applicable, test methods, and specifications concerning testing, packaging, marking or labelling to the extent that they affect products rather than processes. It excludes standards which are prepared for use by a single enterprise, whether governmental, semi-governmental or non-governmental, either for its own production or purchasing purposes".
(COM.IND/W/108, page 24.)

¹There is no agreement on the draft of Article 21: See COM.IND/W/108, para.13.

7. It would seem to be reasonably clear that a large range of sanitary and phyto-sanitary measures would be covered by this definition: for example, hygiene standards relating to the incidence of parasitic and cystic diseases or to permissible levels of residues in meat, processed foods etc. On the other hand the position is less clear as regards measures relating, inter alia, to processes, to conditions in slaughter houses, dairy factories or processing establishments, or to conditions affecting producing countries with respect to the incidence of certain diseases. The view could be taken that in some cases such requirements are not covered as "standards" because, except indirectly and in a very general sense, they would not seem to relate to the properties of a product as such in terms of quality etc. On the other hand the view could be taken that such requirements are covered by the code as constituting "the properties of a product in terms of ... other characteristics". Even on this basis it may be desirable to consider whether a certain class of sanitary or phyto-sanitary measures should be covered in an oblique manner through a broad interpretation of an expression such as "other characteristics".

8. Another aspect of the code's coverage of sanitary and phyto-sanitary measures is that the definition of "standard" only includes "test methods" to the extent that they affect products rather than processes. The apparent exclusion of test methods affecting processes could be taken to infer that standards and sanitary and phyto-sanitary measures relating to processes as opposed to products are also excluded from the code.

9. The proposed code applies, inter alia, standards which in turn are defined in terms of the properties of a product. Would this definition cover live animals? In other words is a live animal to be regarded as a product for the purposes of the code? Does the term "product" mean the product of a manufacturing process or is it to be regarded as anything which is the subject of commercial activity?

10. As noted in paragraph 3 above, certain of the code's provisions could be interpreted as having in practice a particular bearing on standards affecting agricultural products. In the fifth paragraph of the preamble to the code for example it is recognized that no country should be prevented from taking measures for the protection, inter alia, of human animal or plant life. Would this mean that measures introduced on these grounds are exempted from the provisions of the code? This point was discussed at paragraph 21 of MTN/3E/W/11 where it was suggested that such measures would be covered although with some modification in the procedural requirements where "urgency" is a factor.

11. The question remains however whether, in view of the fact that it is just these types of measures which can be important as barriers to trade, the code's treatment is adequate? In other words is the draft code really all that useful in dealing with sanitary and phyto-sanitary regulations? Some aspects of this question are covered in sections C and D of this note. The point to be mentioned here is that the approach adopted in the proposed code represents an attempt to strike what would appear to be a not unrealistic balance between several competing interests. On the one hand States have a distinct interest in the protection, inter alia, of their human, animal or plant life or health and in their ability to take measures for these purposes. On the other hand there is an equally distinct interest in minimizing the impact which such measures may have on international trade.

12. In amplification of the existing GATT rules (Article XX) the proposed code provides that adherents to the code shall ensure that standards are not prepared, adopted or applied with a view to creating obstacles to international trade, and shall likewise ensure that neither standards themselves nor their application have the effect of creating an unjustifiable obstacle to international trade. The effect of the proposed code is thus not to prevent adherents from introducing or enforcing particular measures but it would oblige them in so doing, and at an early stage in the formulation of a measure, to take account of its possible adverse effects on international trade.

13. In the ordinary course of events and where "urgency" is not a factor an adherent to the code, unless it follows a "standard" adopted by an international standards body, would be required to proceed in a way which would enable other parties to comment on the measure before it comes into force. Where "urgency" is a factor, comments subsequently received are to be taken into account in considering whether to initiate amendments. In either case the scheme of the proposed code would be to require the country introducing or applying a measure to take account of comments by other parties and to place some sort of onus on that country to justify the obstacles to trade which the measure may entail. If a satisfactory solution to a contentious matter is not resolved through consultation then the matter may be referred to the code's Committee for Preventing Technical Barriers to Trade which, as the code is presently drafted,² is required to promptly investigate the matter, in the course of which it may consult with any contracting party or with any competent body. The efficacy of these procedures in eliminating or minimizing the adverse trade effects of particular measures within the scope of the code would largely depend on the nature of the sanctions which the Committee would be empowered to authorize; a matter upon which agreement has not yet been reached and on which a number of differing views were expressed in the working group which prepared the current text.

²There is no agreement on the draft of Article 21: See COM.IND/W/108, para.13.

C. The practical effect of the codes application to sanitary and phyto-sanitary measures

14. In paragraph 11 above the point was raised whether the proposed code would be all that useful in dealing with the adverse trade effects of sanitary and phyto-sanitary regulations. In the present section it is proposed to outline some of the main practical effects or advantages of the code and in section D to consider how far the points raised in the discussion on health and sanitary regulations in the Agriculture Committee would be met by the code. For this purpose it is assumed that sanitary and phyto-sanitary measures would be covered as "standards".

15. From a practical point of view some of the more important features of the code would be:

- (a) It would establish a consultative procedure which would cover a wider range of matters than is at present the case under existing GATT rules. In general, obstacles to international trade may be created by the way in which a particular measure is framed or by the way in which it is applied. The existing GATT Article XX(b) relates only to the manner in which such measures are applied in cases where this would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. The code on the other hand would require (a) that sanitary and phyto-sanitary measures are not prepared, adopted or applied with a view to creating obstacles to international trade, and (b) that neither such measures themselves nor their application have the effect of creating unjustifiable obstacles to international trade. As regards the manner in which sanitary and phyto-sanitary measures are framed adherents would be required when drawing up a measure, unless an international standard is used, to follow a procedure (a) under which other interested parties would have the opportunity to comment on the trade aspects of the proposed measure, and (b) which would oblige it to take account of such comment. In practice obstacles to trade may be created simply because the particular agency responsible for drawing up a measure does not for various reasons concern itself with its possible adverse trade effects, and also because other countries with a trade interest in the matter are not aware of the fact that a new measure is being drawn up and, even if they are, they may have no effective right to have their representations taken into consideration. In so far as the proposed code would oblige countries to take account of the trade effects of their measures and of the comments in this respect of other countries, it would seem to represent a useful approach in dealing with the adverse trade effects of sanitary and phyto-sanitary measures.

This would seem to apply also to the scope for consultations under the code as regards the manner in which measures are applied. Here the obligation would be to ensure that measures themselves, or their application, do not

have the effect of creating unjustifiable obstacles to international trade. This formulation would appear to cover a wider range of matters than is at present the case under Article XX(b). It would also seem to suggest that, in the framework of consultations under the code, once it was established that a measure in fact had the effect of creating an obstacle to trade, there would be an onus on the country applying the measure to justify any such obstacle.

- (b) The proposed code would, in respect of matters which it has not been possible to reach agreement through consultations, provide for an investigation of the disputed matter either by the Committee for the Prevention of Technical Barriers to Trade itself or by a panel or working party established by it. This point has already been commented on in paragraphs 4, 5 and 13 above. Depending on the nature of the powers conferred on the Committee there would appear to be some value in having a disputed matter examined by a panel composed, or partly composed, of independent experts which would be able to express an opinion or make findings, for example, on whether the obstacles to trade which a particular measure entails are justifiable, or on whether the objectives of the particular measure are reasonably capable of attainment by an alternative which does not create obstacles to international trade.
- (c) An area of particular difficulty is that sanitary measures, which may otherwise be neutral in their effect on trade, often vary from one country to another with the result that exporting countries are obliged to adapt production to meet differing requirements for each export market. The proposed code would contribute to the harmonization of sanitary and phyto-sanitary regulations by requiring adherents to play a full part in the work of relevant international standards writing bodies and where appropriate to adopt international standards as a basis for their own measures.
- (d) The proposed code would oblige adherents to publish all sanitary and phyto-sanitary regulations which they have adopted (including details of related test methods and administrative procedures) and would, with some exceptions, oblige adherents to allow a reasonable interval between publication and entry into force to enable exporters to adapt to the new requirements. In addition adherents would be required to establish "enquiry points" to answer reasonable enquiries and to facilitate access to information regarding various aspects of such regulations.
- (e) As regards the determination of conformity with the requirements of sanitary and phyto-sanitary regulations the proposed code contains a number of provisions which are designed to facilitate the carrying out of tests under conditions which would involve a minimum of difficulty for exporters.

Thus adherents are urged inter alia, to accept declarations or assurances that an imported product conforms with its requirements, given by the supplier of the product or by a quality assurance body. Where this is not the case the code establishes a number of requirements which are designed to place imported products on an equal footing, so far as possible, with domestic products.

- (f) Finally, in this connexion, the draft code recognizes that to overcome some of the problems which arise, developing countries would require technical assistance and provides that adherents should, when requested, give advice and consider requests for technical assistance. The implications of the proposed code for developing countries are discussed in document COM.TD/W/191.

Section D: The extent to which the points raised in the Agriculture Committee's Examination of Health and Sanitary Regulations would be covered by the proposed code

16. The summary of the discussion on this subject in the Agriculture Committee contained in document MTN/3E/W/2 has been used as a basis for the following commentary:

Points raised in the Agriculture Committee

Comments

1. Need to avoid duplication of the work of other international bodies

The trade effects of sanitary and phyto-sanitary regulations are within the competence of the GATT (Article XX); and it is with the trade aspects of standards and related matters that the proposed code is concerned. Moreover, the approach embodied in the proposed code is not to become involved in the process of standards-writing, which is the function of a number of regional and international bodies, but instead to contribute towards the strengthening of the rôle of such bodies by placing an obligation on adherents (a) to play a full part in the work of such bodies and (b) to adopt international standards as the basis for their own standards.

2. Proposed establishment of guidelines and principles for arbitration similar to those in the International Plant Protection Convention

No decision has yet been made on this aspect: See COM.IND/W/108, paragraph 13.

3. Proposal to supplement consultations on trade effects under Article XXII of the General Agreement through the use of expert rapporteurs and expert advice from specially competent bodies or international organizations

As part of its investigation of a disputed matter not resolved through bilateral consultations under the code, the Committee for the Prevention of Technical Barriers to Trade, or alternatively any panel established by it, would be empowered to consult with any competent body. While this would cover some aspects of the point raised it would be open to question whether greater precision with regard to the rôle of experts in consultations or investigations under the code might be desirable.

Points raised in the Agriculture
Committee

Comments

4. Proposal aimed at strengthening and giving greater precision to Article XX(b) including for example procedures for notification of, and consultations on, measures maintained under that Article.

The relationship between Article XX(b) and the proposed code has not yet been spelt out. Procedures similar to those suggested are included in the code itself.

5. It was also questioned whether health and sanitary regulations were negotiable in the ordinary GATT sense and whether arbitral procedures were appropriate in a situation where in the last analysis the government of each contracting party was responsible for health and sanitary matters.

Such regulations are already subject to the requirements of Article XX(b). On this general point see paragraphs 11 to 13, and in particular 15 above. The aim of the code is to minimize the adverse trade effects of such measures not to eliminate them or prevent their introduction.

6. Elements suggested for inclusions
in proposed general guidelines
to reduce or eliminate the
adverse trade effects of health
and sanitary regulations:

a. (i) elimination of health and sanitary regulations where they no longer meet the requirements of the situation which had motivated their establishment.

No requirement along these particular lines is contained in the code. However, as in any other case under the code, there would be an obligation on a country maintaining an allegedly defunct measure to justify the obstacles to international trade which it entails. This would also depend on whether the provisions of the code are to apply retroactively.

(ii) relaxation, where necessary, of measures currently in force so that they would not be more stringent than necessary.

See 6(i) above.

(iii) new measures should not be made more stringent than necessary

The code's procedures would enable interested parties to make representations along these lines which the party proposing to introduce the measure would be obliged to take into account.

Points raised in the Agriculture
Committee

Comments

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| (iv) equal treatment for imported and domestically produced products | No requirement along these lines is included in the code. Where disparate standards are applied and have the effect of creating obstacles to international trade the normal provisions of the code would be applicable. As regards the determination of conformity with sanitary and phyto-sanitary requirements the relevant provisions of the code are designed to ensure that imported products are accorded treatment not less favourable than domestic products. |
| (v) measures taken by state or local authorities should be consistent with national and international regulations | "The code would impose an obligation on central government bodies (a) to use international standards, and (b) to use all reasonable means to ensure that local government bodies use such standards." What the code does not do is to impose a specific requirement that such regulations should be consistent with one another. |
| (vi) health and sanitary regulations should be applied on a most-favoured-nation and non-discriminatory basis | The point would seem to be covered both by the present GATT Article XX(b) and by the standard provision of the code. |
| (vii) provision for more co-operation between exporting and importing countries with regard to importation, testing and issuance of certificates. | Most elements of this proposal would seem to be covered by the provisions of the code relating to the determination of conformity with standards (see paragraph 15 (e) above). In addition certain other provisions of the code are designed to facilitate access to and broaden the membership of quality assurance systems. One effect of this would be to enable conformity with sanitary and phyto-sanitary requirements to be determined on a contractual and objective basis. |

Section E: Points for consideration

17. In the foregoing general discussion of some aspects of the applicability of the proposed code to sanitary and phyto-sanitary regulations a number of points have been made which it is proposed to re-formulate here as a suggested basis for further examination. The points which have been raised are by no means definitive, least of all from a technical point of view, and further examination of this subject at a general and technical level would undoubtedly reveal other important aspects of the code's applicability to such regulations.

- (a) Whether the term "standard" as defined in the draft code adequately covers all sanitary and phyto-sanitary regulations including requirements for determining conformity with such measures? If not, what modifications to the definition and other provisions of the code would be needed to adequately cover, inter alia, measures relating to processes, to the incidence of disease, and to other requirements which may not be directly related to the properties of an agricultural product as such?
- (b) Whether the approach embodied in the draft code as regards the freedom of adherents to take measures necessary for the protection of human animal or plant life or health is appropriate, or whether another approach might be more appropriate in view of the fact that measures maintained or introduced on these grounds are of particular significance in agricultural trade?
- (c) Whether the consultative and arbitral procedures envisaged in the draft code would be appropriate and useful in dealing with the specialized problems which may arise in connexion with sanitary and phyto-sanitary regulations? Or whether, in view, inter alia, of the general and specific points raised in the Agriculture Committee's discussion of this subject, greater precision should be given to the principles and procedures of the proposed code as regards sanitary and phyto-sanitary regulations?
- (d) Generally, whether the draft code should be adapted and modified to effectively cover sanitary or phyto-sanitary regulations if and to the extent that this is considered to be necessary? Or whether some other approach, either within or outside the framework of the proposed code, would be more appropriate?