

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Multilateral Trade Negotiations

Group "Agriculture"

Sub-Group on Dairy Products

LEGAL PROBLEMS RAISED BY THE NEGOTIATION IN THE DAIRY PRODUCTS SECTOR

Note by the Secretariat

1. At its meeting of 24-26 April 1978, the Sub-Group on Dairy Products requested the secretariat to prepare before its next meeting a note listing the legal problems which might be raised on the occasion of the negotiation of the draft arrangement regarding the dairy products sector, and any solutions which might be found thereto.
2. This note attempts to meet that request. Quite probably, of course, not all the legal problems which might arise are dealt with and it will be for delegations members of the Sub-Group to point out any gaps in this analysis. This note has been prepared on the basis of the draft arrangement included in document MTN/DP/W/27/Rev.3, because the fourth revision of this document had not yet been completed. It does not seem, at first sight, that the legal problems raised by the fourth revision differ in nature from those which are discussed in this note.
3. Lastly, this document has been prepared under the sole responsibility of the secretariat. The current multilateral negotiations, because of their generality, give rise to problems on many points on which the CONTRACTING PARTIES, the authority competent to interpret the General Agreement, have never had to rule in the past, either because these problems were never raised or because they are completely new.
4. This note will deal successively with:
 - (a) problems relating to concessions,
 - (b) problems relating to settlement of disputes,
 - (c) problems relating to possible variable participation in various instruments established under the Arrangement,
 - (d) problems relating to the duration of the Arrangement,
 - (e) problems relating to the decision-making process in the organs of the Arrangement.

I. Problems relating to concessions

(A) Problems relating to the recording of concessions

5. These problems arise from Article VI of the Arrangement, Article VII of Annex 1, Article VII of Annex 2, Article II of Annex 3 and Article I of Annex 4, considered in conjunction with paragraph 4 of Article IX of the Arrangement. They may be briefly described in the following terms: some governments wish to include the concessions on tariff and non-tariff measures exchanged in the dairy products sector as a whole within the body of the Arrangement itself, and more specifically in the annexes to the Arrangement, the text as a whole (five parts plus the annexes) being in turn annexed to the Final Act (.....). Other governments would wish these concessions to be directly incorporated in the schedules annexed to the General Agreement but would not object to their being also included, for purely informational purposes, in the annexes to the Arrangement.

6. It does not seem, as one analyses the problem, that one or the other of these recording methods involves any difference from the legal point of view. Whether the concessions are recorded in the schedules annexed to the General Agreement or in the annexes to the Arrangement - the Arrangement itself to be annexed to the Final Act (.....) - this does not involve any modification as regards the rights and obligations under the various provisions of the General Agreement governing the legal régime applicable to these concessions, in particular Articles II and XXVIII of the General Agreement. In order to avoid any uncertainty in this respect, it would be useful to indicate in the annexes to the Arrangement, (in the event that the concessions were set forth only in the annexes) that "any schedule annexed to the Arrangement relating to a contracting party shall become a schedule of that contracting party annexed to the General Agreement as from".

7. It should be clear that all the concessions extended by an individual contracting party, although scattered in various legal instruments constitute, together, the schedule relating to that individual contracting party. Hence, as regards the view which has been expressed concerning the possibility of repatriating to the annexes to the Arrangement all or part of the concessions concerning the dairy products sector which had been negotiated in the past and are now scattered in various protocols, the solution proposed in paragraph 6 above does not bring out the usefulness of such a step. In any case, these past concessions would remain listed in the schedules in which they appear at present. This being so, it would also be possible to record them in the annexes to the Arrangement and, if necessary to mention in the Arrangement any specific provision which the Sub-Group might wish to introduce as regards those concessions.

(B) Problems relating to non-tariff concessions

8. It appears that nothing in Article II of the General Agreement would prevent the recording of non-tariff concessions in the schedules. In fact, while many paragraphs, including paragraph 1(b) refer to "duties or charges of any kind", paragraph 1(a) of that Article refers to "treatment" accorded to "commerce" and the inclusion of non-tariff concessions in the schedules does not seem to require any specific method of recording or any amendment to Article II of the General Agreement.

9. As regards the problem as to whether the minimum (or maximum) price obligations set forth in Articles III:1 and VI of Annex 1 and Articles III:1 and VI of Annex 2 to the Arrangement can be regarded as non-tariff concessions in the same way as the concessions included in Annex 1 Article VII, Annex 2 Article VII, Annex 3 Article II or Annex 4 Article I, this is probably a matter of convenience. But it does not seem desirable, in particular, to rule that such obligations are an integral part of Part I of the General Agreement (under Article II:7 of the General Agreement), as this would carry preposterous consequences: for example, it could be argued that any modification of the minimum price under the Arrangement should require the unanimity of the CONTRACTING PARTIES. The obligations and the concessions remain distinct because of irreconcilable differences as to their specific nature which would make any attempt at assimilation quite uncertain. In any case, it does not seem that the objective aimed at by some members is a legal assimilation of these instruments but more simply to include the obligations and the concessions in a system of equivalences, because the obligations and the concessions contribute to ensuring and maintaining the overall balance of advantages which each participant can expect to reap from the negotiations.

10. A "system of equivalences" may be established, either in the context of the Dairy Arrangement alone, or in the overall balance of the final package of the Tokyo Round. In either case, provision has to be made for the protection of this balance and, if necessary, for its restoration. Such provisions will be different from one situation to the other.

The following situations may occur:

- (i) A participant may not be able to maintain its general obligations under the Arrangement.

A situation comparable to Article XIX or Article XXIII of the GATT occurs and the other participants in the Arrangement should eventually have the possibility of suspending substantially equivalent concessions or other obligations under the Arrangement.

As such suspensions will be done on a selective basis contracting parties not participating in the Arrangement will not be affected. The surveillance of any action taken in this regard should therefore be with the Dairy Council. If the Arrangement constitutes a balance in itself the suspension of concessions should be limited to the concessions annexed to the Arrangement. Otherwise, if the overall balance is to be found in the final results of the MTN, the suspension of any substantially equivalent concessions would seem appropriate.

- (ii) A participant may wish to withdraw or renegotiate a concession annexed to the Arrangement. As these concessions constitute part of the GATT schedule the normal provisions of Article XXVIII of the GATT apply.
- (iii) A participant may withdraw from the Arrangement. The first point to be made is that any tariff or non-tariff concessions granted by the participant and annexed to the Arrangement form part of its GATT schedule and are therefore not affected by its withdrawal from the Arrangement. In case such a participant would wish to withdraw or modify any of these concessions the normal procedure under Article XXVIII of the General Agreement should be followed. As regards the other participants, their obligations under the Arrangement vis-à-vis the withdrawing participant lapse automatically. On the other hand, to the extent that other participants have paid tariff or non-tariff concessions for the participation of the withdrawing participant, such concessions form part of the GATT schedule of the individual participants and do not lapse. To overcome this problem provision should be made in the Arrangement enabling any of the other participants to seek recourse to Article XXVIII of the General Agreement leading eventually to the withdrawal of substantially equivalent concessions initially negotiated with the withdrawing participant.

11. Non-tariff concessions also raise a specific problem as to whether it is possible to include under the General Agreement concessions relating to measures maintained by participants in breach of various provisions of the General Agreement. It would seem that the solution of this problem could derive less from legal considerations properly speaking than from considerations of convenience.

12. First, as regards measures the legality of which has simply been questioned but in respect of which the CONTRACTING PARTIES have never made a firm ruling, it would seem that, in the absence of any explicit mention in the General Agreement, one could conclude that acceptance by participants of these concessions relating to such measures at the time of signature of the instruments resulting from the multilateral trade negotiations confers upon those concessions the same legal validity as the validity of concessions relating to measures the legality of which with regard to the General Agreement has never been challenged. As regards the concessions relating to measures whereby one or several contracting parties evade obligations deriving from the General Agreement, it should be concluded that annexing such concessions to the General Agreement would in no way prejudice the question of their consistency with the GATT provisions.

13. The particular modalities of non-tariff concessions referred to as "concerted disciplines" do not seem to raise any specific legal problems, in particular in relation to Article I of the General Agreement. It has been a constant tradition that concessions are deemed to apply to a specific item and not to a given country. In any case, a number of such concessions already exist in the schedules annexed to the General Agreement. The situation would be different if a non-tariff concession of the "concerted discipline" type operated so as to make it possible for only one or several participants, and impossible for others, to benefit from the advantage resulting from that concession. Quite clearly, such a concession carrying discriminatory consequences would not be valid under the General Agreement.

II. Legal problems relating to settlement of disputes

14. The problem of the settlement of disputes is being negotiated under Part I, Article IV:5 and 6 of the Arrangement. The first sentence of paragraph 5 establishes, in respect of the dairy products sector as defined in Article XXII:1 of the Arrangement, a procedure similar to that laid down in Article XXII:1 of the General Agreement. The second sentence of paragraph 5 establishes a procedure similar to that of Article XXII:2 of the General Agreement. Article IV:6 of the Arrangement refers back to the procedure of Article XXIII of the General Agreement.

15. First, one cannot say that recourse to the procedures of Article IV:5 of the Arrangement is optional or discretionary. The fact that this special recourse has been provided for in the Arrangement reflects the intention of the members of the Sub-Group that the procedure should be followed before recourse shall be had to the normal GATT dispute settlement procedures in accordance with paragraph 6. However, according to the provisions of paragraph 4 of Article IX each participant maintains its right to resort directly to the provisions of Articles XXII or XXIII of the General Agreement without invoking the procedure provided in the Arrangement. In any case it should be made explicit that once the procedure under paragraphs 5 and 6 of Article IV of the Arrangement has been completed, the participant who wishes to have recourse to the normal GATT procedures has fulfilled the requirements of Articles XXII:1 and XXIII:1 of the General Agreement.

16. It remains, however, that the final wording of Article IV:6 of the Arrangement would have to take account of the need to afford participants that are not contracting parties an opportunity to settle their differences. To this end, some wording along the lines of Article XXIII of the General Agreement will be needed. The more general case of the situation of participants that are not parties to the General Agreement is dealt with in paragraphs 18 and 19 hereafter.

III. Problems relating to variable participation

17. While it appears that the most important countries will probably participate in the whole of the Arrangement, it is nonetheless probable that a number of countries will participate in some parts only, for instance in some protocols but not others. It will naturally be for these latter countries to make whatever reservations they consider necessary upon signing the Arrangement, such reservations to be approved by the other participants.

18. The general case of participants which are not parties to the General Agreement could be dealt with through the inclusion in Article IX:5 of the Arrangement, dealing with acceptance, of a provision under which "any government which is not a contracting party to the General Agreement on Tariffs and Trade, or has not acceded provisionally to that Agreement, may accede to this Arrangement on terms to be agreed between that government and the participants to this Arrangement".

19. It should be mentioned in this respect that if concessions granted by participants which were not parties to the General Agreement were included in an Annex to this Arrangement, these concessions, contrary to those exchanged between participants which are parties to the General Agreement, could not be annexed to the General Agreement and be an integral part of Part I. However, it would appear possible to insert the following in the Final Provisions: "The trade relations between the participants, as regards products covered by Article II of the Arrangement, shall be based on the General Agreement and a schedule annexed to this Arrangement relating to a non-contracting party is for the purposes of this Arrangement considered to be a schedule annexed to the General Agreement".

IV. Problems relating to the duration of the Arrangement

20. The validity of the Arrangement is not limited in time by the provisions of Article XXIX nor by the principles approved by the Economic and Social Council of the United Nations in Resolution No. 30(IV) of 28 March 1947, which constitutes merely a guideline which the participants may refrain from applying to the Arrangement. Moreover, Article XX(h)

provides specifically for the possibility of submitting an international commodity agreement to the CONTRACTING PARTIES. An Arrangement attached to the Final Act (.....) is so submitted and thereby approved by the CONTRACTING PARTIES. To this effect, it would suffice if no specific mention of the duration of the Arrangement were made in the Final Provisions or elsewhere.

V. Problems relating to the decision-making process in the various organs of the Arrangement

21. The desire has been expressed in the Sub-Group that the various management bodies of the Arrangement should reach their decisions by consensus. It is suggested that the following be included in Article VIII:1 and 2 of the Arrangement: "The Council (or the Committee) shall reach its conclusions by agreement. The Council shall be deemed to have agreed on a matter submitted for its consideration if no member of the Committee formally challenges its conclusions. A conclusion shall be deemed to have been challenged if a country which does not consider it acceptable announces its intention of invoking Article IV:6 or Article IX:6 of the Arrangement".