

Negotiating Group on Market Access

GIVING LEGAL EFFECT TO COMMITMENTS ON NON-TARIFF BARRIERS

Background note by the Secretariat¹

Revision

1. The Secretariat was requested to prepare a note setting out the various means by which legal effect has been given to Members' commitments concerning non-tariff barriers ("NTBs") arising from previous rounds of multilateral trade negotiations in the GATT and sectoral negotiations in the WTO.

2. The term "NTB" covers in principle any measure that is not a tariff and encompasses a broad range of instruments that can affect the flow of trade. The concept can be traced back to the GATT which envisaged a trading system governed by tariffs and prohibited quantitative restrictions. Paragraph 16 of the Doha Ministerial Declaration established the mandate to reduce or as appropriate eliminate NTBs, in particular on products of export interest to developing countries. Given the absence of a definition of the term NTB, this note uses it in the sense in which it has been understood in notes previously circulated.²

3. The means of giving legal effect to commitments concerning NTBs can be organized in four groups:

- (a) multilateral agreements;
- (b) individual Members' commitments;
- (c) plurilateral agreements; and
- (d) other.

A. MULTILATERAL AGREEMENTS

4. Many WTO obligations concerning NTBs are given legal effect through multilateral agreements. These agreements are binding on all Members.³

5. GATT 1994 itself sets out many obligations concerning NTBs, most of which apply in terms of the nature of the NTB. Many of these obligations have been further elaborated and supplemented by other multilateral WTO agreements, such as those on particular aspects of import procedures in the Agreement on Implementation of Article VII (Customs Valuation), Agreement on Preshipment Inspection, Agreement on Rules of Origin and the Agreement on Import Licensing Procedures; those

¹ This document has been prepared under the Secretariat's own responsibility and is without prejudice to the positions of Members and to their rights and obligations under the WTO Agreement.

² See the inventory of NTBs circulated in document TN/MA/S/5/Rev.1 and the Secretariat note on sector-specific discussions in document TN/MA/S/13.

³ Article II:2 of the Marrakesh Agreement Establishing the WTO.

on trade remedies: the Agreement on Implementation of Article VI (Anti-dumping), Agreement on Subsidies and Countervailing Measures and the Agreement on Safeguards; and one on investment measures: the Agreement on Trade-Related Investment Measures (TRIMS).

6. GATT 1994 provides for general exceptions, which apply to NTBs in terms of the policy objectives that they pursue, such as health, intellectual property and environmental measures. Some of these NTBs are also the subject of other multilateral WTO agreements that apply in terms of the nature of the NTB, such as the SPS Agreement, the TBT Agreement and certain sections of the TRIPS Agreement.

7. Some multilateral WTO agreements contain obligations concerning NTBs that apply in terms of the nature of the NTB within particular product sectors only, such as the provisions on quantitative restrictions in the Agreement on Textiles and Clothing (now terminated), or the obligation on conversion of several types of border measures into ordinary customs duties in Article 4.2 of the Agreement on Agriculture. Although limited in their scope to particular products, these obligations apply (or applied) to all Members on a multilateral basis.

8. Certain multilateral "Understandings" were also agreed in the Uruguay Round and incorporated into GATT 1994 so that they form part of that agreement.⁴ One of these Understandings confirms commitments and creates obligations specifically dealing with one particular type of NTB, namely, balance-of-payments restrictions.⁵

B. PLURILATERAL AGREEMENTS

9. Certain WTO obligations concerning NTBs in particular sectors are given legal effect through plurilateral agreements. These agreements create obligations that bind Members that have accepted those agreements. They do not create obligations or rights for Members that have not accepted them.⁶ There are now two plurilateral agreements in the WTO: the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement.⁷

10. The Agreement on Trade in Civil Aircraft dates from the end of the Tokyo Round in 1979 and was annexed, unchanged, to the WTO Agreement. Its product coverage is limited. It includes provisions on NTBs, including certification requirements, specifications on operating and maintenance procedures, quantitative restrictions and import and export licensing requirements.

11. The Agreement on Government Procurement was annexed to the WTO Agreement in 1994. Its scope is limited to procurement by government entities listed in an appendix. It includes provisions on NTBs, including national treatment, rules of origin and technical specifications.

12. Prior to the establishment of the WTO, the Tokyo Round Codes were a series of agreements interpreting and elaborating particular GATT provisions agreed in 1979, but accepted by only some of the GATT contracting parties. Some of the Codes concerned NTBs and were predecessors of the corresponding WTO agreements, such as the codes on import licensing procedures, customs valuation, anti-dumping⁸, subsidies and countervailing measures, technical barriers to trade, as well as the codes on trade in civil aircraft and government procurement.

⁴ See Article 1(c) of GATT 1994.

⁵ The Understanding on the Balance-of-Payment Provisions of the GATT 1994.

⁶ Article II:3 of the Marrakesh Agreement Establishing the WTO.

⁷ Two other plurilateral agreements: the International Dairy Agreement and International Bovine Meat Agreement, were annexed to the Marrakesh Agreement Establishing the WTO, but were terminated effective 1 January 1998.

⁸ An earlier code on anti-dumping dated from the end of the Kennedy Round in 1967.

C. INDIVIDUAL MEMBERS' COMMITMENTS

13. Certain WTO obligations concerning NTBs are given legal effect through commitments by individual Members. These commitments are binding on the Member making the commitment and create rights for all other Members. This applies irrespective of whether they result from multilateral, sectoral or bilateral negotiations. These non-tariff concessions are not to be confused with additional terms and conditions which have been embodied in Part I (most favoured nation tariff) of some Members' schedules.⁹

14. At the conclusion of the Uruguay Round, eight Members included certain "Non-Tariff Concessions" in Part III of their respective schedules of concessions on goods.¹⁰ Each of these concessions lists tariff item numbers with descriptions of the relevant products or product sectors, and sets out information on the non-tariff concession that is made. These usually entail removal or elimination of particular measures such as quantitative restrictions and import licensing requirements.

15. The Accession Protocols of three other Members set out commitments in Part III of their respective schedules.¹¹ Some of these relate to particular types of non-tariff measures (e.g. import permits, tendering requirements, safeguards and standards), while others relate to specific concessions on some non-agricultural products (e.g. tariff quotas and its allocation).

16. The Chemical Agreement of 1967¹² sought to give legal effect to three commitments concerning NTBs by distinct means. First, the elimination of the United States' American selling price system of valuation for chemical products was a condition precedent to entry into force of the agreement, which provided for additional tariff reductions on chemical products by six contracting parties and the EEC. The agreement then provided for removal of an import restriction by one contracting party, which was given legal effect by the insertion of a note after the relevant tariff line in its schedule, and it also contained an undertaking by three contracting parties to reform their method of levying automobile road taxes.

17. Although the tariff / NTB distinction does not apply to trade in services, the GATS illustrates techniques that can be used in drafting individual Members' commitments in particular trade sectors. The Reference Paper on basic telecommunications has no legal status but serves as a guide or model for negotiated commitments. The Understanding on Commitments in Financial Services, annexed to the Final Act of the Uruguay Round, but not formally part of the GATS, provides a formula approach that Members may voluntarily choose to adopt for commitments in that sector.

D. OTHER

18. The Information Technology Agreement or "ITA", formally named the Ministerial Declaration on Trade in Information Technology Products, was a declaration made in 1996 by the

⁹ For example, the EEC-12 schedule provided that some concessions were subject to a "certificate issued in accordance with the conditions laid down by relevant Community provisions" and others were subject to certain packaging and labelling requirements. Hungary's schedule indicated that some concessions were subject to an import licensing fee. Korea's schedule lists products in which state trading enterprises can impose a mark-up on sales. The United States' schedule includes a note on "Adjustment of Escape-Clause compensation".

¹⁰ The eight Members concerned are Belize, Cameroon, El Salvador, Egypt, Indonesia, Malta, Senegal and Trinidad & Tobago. At the informal meeting of the Negotiating Group on Market Access that took place on 12 December 2006, the delegation of Australia noted that Part I of their UR Schedule included a commitment not to impose export taxes on some minerals.

¹¹ The three Members concerned are China, Chinese Taipei and Saudi Arabia.

¹² Agreement relating principally to Chemicals supplementary to the Geneva (1967) Protocol (BISD 15S/8).

Ministers of fourteen Members and one then-acceding Member. Its product coverage is limited. Its provisions on tariff reductions were given effect through individual Members' commitments, brought into force by means of certifications of modifications to the participants' goods Schedules. These create rights for all WTO Members. However, the ITA created obligations for participating Members only, like a plurilateral agreement.

19. With respect to NTBs, the ITA includes an undertaking by the participants to consult, without prejudice to rights and obligations under the WTO Agreement, as well as an undertaking to consider any divergence in customs classification of information technology products.¹³ The ITA Committee has been carrying out a work programme on non-tariff measures, in the course of which it has completed a pilot project on the types of conformity assessment procedures for EMC/EMI.

¹³ WT/MIN(96)/16, paragraphs 3, 5 and 7.