

MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

Negotiating Text on Non-Tariff Barriers Pertaining to the
Electrical Safety and Electromagnetic Compatibility (EMC) of Electronic Goods

Communication from the United States

Revision

The following communication, dated 10 September 2009, is being circulated at the request of the delegation of the United States.

**Agreement on Non-Tariff Barriers Pertaining to the
Electrical Safety and Electromagnetic Compatibility (EMC) of Electronic Goods**

Members,

Recalling that pursuant to paragraph 16 of the Doha Ministerial Declaration, Members agreed to negotiations aimed at reducing or as appropriate eliminating tariffs and non-tariff barriers on non-agricultural goods;

Recognizing the important contribution of electronic goods to global economic growth and development;

Desiring to ensure that technical regulations, standards, and conformity assessment procedures do not create unnecessary obstacles to international trade in electronic goods;

Affirming their existing rights and obligations under the WTO Agreement, including the Agreement on Technical Barriers to Trade (TBT Agreement);

Recognizing that no Member should be prevented from taking measures that are necessary for the protection of human, animal or plant life or health, of the environment, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement, or that are necessary for the protection of its essential security interest;

Recognizing that a Member's selection of an appropriate conformity assessment procedure may involve the consideration of a number of factors, such as the risks associated with non-conformity or the product for which conformity is sought;

Seeking to supplement and elaborate on the TBT Agreement with respect to standards, technical regulations, and conformity assessment procedures affecting electronic goods; and

With a view to expanding the products listed in Members' schedules to Annex I, II, III, and IV to this Agreement in the future.

Agree as follows:

I. DEFINITIONS

For purposes of this Agreement:

Central government body means a central government body as defined in Annex 1 of the TBT Agreement;

Electronic good means any information technology, telecommunications, audio-visual, or other electronic or electrical product, whether for business or personal use, listed in Annex I of this Agreement; *[Note: Annex I would cover a range of products falling under Chapter 84, 85, or 90 of the World Customs Organization's Harmonized Commodity Description and Coding System and apply to all Members];*

Supplier means any party that supplies the product and may include a manufacturer, distributor, or importer;

Supplier's declaration of conformity (SDoC) means a declaration by a supplier based on an evaluation of the results of conformity assessment procedures that a product meets a specified standard or technical regulation or other specification;

Standard, technical regulation, or conformity assessment procedure means respectively a standard, technical regulation, or conformity assessment procedure as defined in Annex 1 of the TBT Agreement that pertains to the electrical safety or electromagnetic compatibility (EMC) of an electronic good; and

Third-party certification means a declaration by a body, which the Member accepting the declaration has determined is independent of suppliers and users, that a product meets a specified standard or technical regulation or other specification based on an evaluation of the results of conformity assessment procedures.

II. SCOPE AND COVERAGE

A. This Agreement shall apply to any standard, technical regulation, or conformity assessment procedure, as defined in paragraph I.

B. This Agreement shall impose obligations on Members only with respect to standards, technical regulations, and conformity assessment procedures of central government bodies.

C. This Agreement shall not apply to purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies.

D. Any reference in this Agreement to standards, technical regulations, or conformity assessment procedures shall be construed to include any amendment thereto and any additions to the rules or product coverage thereof, except amendments and additions of an insignificant nature, to the extent such amendment or addition pertains to electrical safety or EMC for electronic goods.

III. STANDARDS, TECHNICAL REGULATIONS, AND CONFORMITY ASSESSMENT PROCEDURES

Assessing Costs

A. Where a Member proposes to prepare or adopt a technical regulation or conformity assessment procedure, it shall take into account, *inter alia*, costs of complying with the proposed technical regulation or conformity assessment procedure.

International Standards

B. In determining whether an international standard, guide or recommendation within the meaning of Articles 2 and 5 and Annex 3 of the TBT Agreement exists pertaining to electrical safety or EMC of an electronic good, each Member shall base its determination on the principles set out in *Decisions and Recommendations adopted by the Committee since 1 January 1995, G/TBT/1/Rev.8, 23 May 2002, Section IX (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement) (Committee Decision)* issued by the WTO Committee on Technical Barriers to Trade (TBT Committee).

Transparency

C. Further to Articles 2.9 and 5.6 of the TBT Agreement, where a Member proposes to prepare or adopt a technical regulation or conformity assessment procedure that may have a significant effect on trade of other Members, the Member shall, with a view to providing meaningful opportunity for comment:

- (1) publish, in print or electronically, the proposed technical regulation or conformity assessment procedure at the earliest appropriate stage, in such a manner as to enable interested parties to become acquainted with it and to submit written comments before the Member finalizes it;¹
- (2) to the extent applicable, identify in any notification it makes pursuant to Article 2.9.2 or 5.6.2 of the TBT Agreement any provisions of the proposed technical regulation or conformity assessment procedure that deviate in substance from relevant international standards, guides, or recommendations;
- (3) upon request from another Member, provide particulars concerning how it took or plans to take into account the costs of complying with the proposed technical regulation or conformity assessment procedures in accordance with paragraph A;
- (4) normally allow not less than 60 days for Members to comment in writing on the proposed technical regulation or conformity assessment procedure;

¹ When a Member publishes a proposed technical regulation or conformity assessment procedure in accordance with this subparagraph, it shall be deemed to have satisfied the obligation in Article 2.9.1 or 5.6.1 of the TBT Agreement, as the case may be, to publish a notice of the proposed technical regulation or conformity assessment procedure.

- (5) (i) allow reasonable time for interested parties to comment in writing on the proposed technical regulation or conformity assessment procedure, which normally shall not be less than 60 days;² and (ii) take into account any such comments the Member receives in finalizing the technical regulation or conformity assessment procedure; and
- (6) publish, in print or electronically, any written comments it receives from Members or interested parties on the proposed technical regulation or conformity assessment procedure.

Members shall comply with the obligations set out in this paragraph and Articles 2.9 and 5.6 of the TBT Agreement regardless of whether relevant international standards, guides, or recommendations exist or the technical content of the proposed technical regulation or conformity assessment procedure is in accordance with relevant international standards, guides, or recommendations.

D. Where urgent problems of safety, health, environmental protection, or national security arise or threaten to arise for a Member, the Member may omit such steps enumerated in paragraph C as it finds necessary, provided that the Member, upon finalizing the technical regulation or conformity assessment procedure, shall:

- (1) to the extent applicable, identify in any notification it makes pursuant to Article 2.10.1 or 5.7.1 of the TBT Agreement any provisions of the technical regulation or conformity assessment procedure that deviate in substance from relevant international standards, guides, or recommendations;
- (2) upon request, provide other Members particulars concerning how it took or plans to take into account the costs of complying with the technical regulation or conformity assessment procedure in accordance with paragraph A; and
- (3) (i) allow interested parties to submit comments in writing on the technical regulation or conformity assessment procedure; and (ii) take these comments into account in deciding whether to modify the technical regulation or conformity assessment procedure.

E. Further to Article 4.1 and Annex 3 of the TBT Agreement, where a Member proposes to prepare or adopt a standard, it shall with a view to providing meaningful opportunity for comment:

- (1) publish, in print or electronically, the proposed standard at the earliest appropriate stage, in such a manner as to enable interested parties to become acquainted with it and to submit written comments before the Member finalizes it;
- (2) notify other Members through the Secretariat of the proposed standard at the earliest appropriate stage, including the products the proposed standard covers, together with a brief indication of its objective and rationale and, to the extent applicable, any provisions of the standard that deviate in substance from relevant international standards, guides, or recommendations;
- (3) upon request from another Member, provide particulars concerning the proposed standard;
- (4) upon request, discuss written comments it receives from Members and take the results of those discussions into account in finalizing the proposed standard; and

² Each Member shall publish a notice, in print or electronically, specifying the comment period and give favourable consideration to reasonable requests from interested parties to extend it.

- (5) publish, in print or electronically, any written comments it received from Members or interested parties on the proposed standard.

Each Member shall provide for standardizing bodies within its territory to apply paragraphs L and M of Annex 3 to other Members as well as to interested parties within the territory of a Member of the WTO.

F. When publishing a standard, technical regulation, or conformity assessment procedure, or if paragraph D applies, as soon as possible after publication of the final standard, technical regulation, or conformity assessment procedure, each Member shall publish, in print or electronically:

- (1) its responses to any significant and relevant issues raised in comments it received from Members or interested parties during the comment period;³ and
- (2) the objective and rationale for preparing or adopting the particular standard, technical regulation, or conformity assessment procedure.

Treatment of Conformity Assessment Bodies

G. Each Member shall accord to conformity assessment bodies in the territory of any other Member treatment no less favourable than that it accords to conformity assessment bodies in its own territory with respect to the procedures, criteria, and other conditions with which conformity assessment bodies must comply in order for the Member to accredit or otherwise approve them as competent to test or certify that a product conforms with the Member's standard or technical regulation. This paragraph shall apply only with respect to products listed for electrical safety, EMC or both in the Member's schedule to Annex II.

Test Results

H. If a Member requires test results (alone or in conjunction with other assurances of conformity) or other assurances of conformity that are based on test results as an assurance that a electronic good conforms with a standard or technical regulation, it shall not require the testing to be performed in a testing facility within its territory and shall accept the test results if they are performed by a facility that the Member deems competent, or otherwise approves, for that purpose. If the Member requires the testing facility to comply with requirements concerning the testing of electronic goods for conformity with the standard or technical regulations or requires the body that accredits the testing facility to comply with requirements concerning that accreditation, it shall ensure that such requirements are based on:

- (1) a relevant international standard, guide or recommendation that has been developed in accordance with the TBT Agreement and the Committee Decision; or
- (2) a conformity assessment procedure established by the Member in accordance with the procedures set out in paragraphs III.C and III.F.

³ For greater certainty, if a Member or an interested party submits comments during the comment period that raise questions or concerns regarding why the standard, technical regulation or conformity assessment procedure deviates from relevant international standards, guides, or recommendations or how the Member took into account the costs of complying with the technical regulation or conformity assessment procedure, the Member shall publish its responses to such comments.

SDoC

I. If a Member requires a positive assurance that a product listed for electrical safety, EMC or both in its schedule to Annex III conforms with a standard or technical regulation, it shall accept as such assurance a supplier's declaration of conformity (SDoC). The Member shall base any requirements for an SDoC on a relevant international standard, guide or recommendation that has been developed in accordance with the TBT Agreement and the *Committee Decision*, and may refuse to accept a declaration from any supplier if, upon request from the Member's regulatory or enforcement authorities, the supplier does not provide to those authorities documentation necessary to demonstrate the basis for a declaration or declarations (e.g., relevant test results) within a reasonable period after the date of the request.

Third-Party Certification

J. If a Member requires third-party certification as positive assurance that a product listed for electrical safety, EMC, or both, in its schedule to Annex IV, conforms with a standard, technical regulation, or conformity assessment procedure, it shall not require the body performing the third-party certification to be within its territory and shall accept the third party certification if it is performed by a body that the Member deems competent, or otherwise approves, for that purpose. The Member shall ensure that it bases any requirements that the body must meet to be deemed competent or otherwise approved on:

- (1) a relevant international standard, guide or recommendation that has been developed in accordance with the TBT Agreement and the *Committee Decision*; or
- (2) a conformity assessment procedure established by the Member in accordance with the procedures set out in paragraphs III.C and III.F.

Members shall give positive consideration to allowing certification bodies to base certifications, where such certifications are required, on test results from any testing facility that the certification body deems competent or otherwise approves.

Procedures for Review

K.

- (1) Each Member shall establish or maintain judicial, quasi-judicial, or administrative tribunals and procedures for the purpose of the review of its administrative actions relating to technical regulations and conformity assessment procedures. Each Member shall ensure that such tribunals are impartial and independent of the office or authority entrusted with administrative enforcement and not have any substantial interest in the outcome of the matter and that proceedings before such tribunals comply with due process of law.
- (2) Each Member shall also establish or maintain procedures for it to review, at regularly-scheduled intervals, its technical regulations and conformity assessment procedures to determine whether such measures should be modified or eliminated so as to make the Member's regulatory program more effective in achieving the legitimate objective(s) pursued.

IV. INFORMATION AND ASSISTANCE

Nothing in this Agreement shall be construed to require a Member to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

[We may want to include other provisions under this heading along the lines of those in TBT Articles 10 and 11]

V. MONITORING AND OVERSIGHT

A Subcommittee on Electronic Goods (Subcommittee) is hereby established as a subcommittee to the TBT Committee to oversee the operation and implementation of this Agreement and further its objectives and to provide a forum for discussions on any matter related to this Agreement. The Subcommittee shall:

- (1) comprise representatives of each Member;
- (2) elect its own Chairman and apply the TBT Committee working procedures;
- (3) meet 12 months after the date of entry into force of this Agreement, and at the end of each one-year period thereafter, or earlier as necessary, to:
 - (a) review the implementation and operation of this Agreement, and where appropriate, consider proposals for amending it; and
 - (b) review Annexes I, II, III, and IV and consider whether they should be modified; and
- (4) report to the TBT Committee and the Committee of Participants on the Expansion of Trade in Information Technology Products established pursuant to the *Communication to the Chairman of the Council on Trade in Goods: Implementation of the Ministerial Declaration on Trade in Information Technology Products G/L/160* (March 26, 1997) (ITA Committee) with a view to complementing and not duplicating the work of those committees, and to this end, communicate to the TBT and ITA Committees the results of its review conducted pursuant to subparagraph (3) and, as appropriate, any proposed amendments to this Agreement or recommendations to modify Annex I, II, III, or IV.

VI. DISPUTE SETTLEMENT

Article 14 of the TBT Agreement shall apply *mutatis mutandis* to this Agreement.

[Note: Need to further consider relationship with Dispute Settlement Understanding]

VII. FINAL PROVISIONS

Annexes

Annexes I, II, III, and IV shall constitute an integral part of this Agreement. To the extent a Member seeks to modify its schedule to Annex II, III, or IV and the modification would expand the products subject to this Agreement, the Member may do so by notifying other Members through the Secretariat of the Member's modified schedule. The Secretariat shall modify Annex II, III, or IV, as necessary, to include the Member's modified schedule. A Member may modify its schedule to Annex II, III, or IV in a manner that would reduce the products subject to this Agreement in accordance with Article [] (Modification of Schedules) of this Agreement.

[Note: Need to consider additional "final provisions" to be included in this Agreement, such as entry into force, withdrawal, amendment, modifications of schedules, WTO Secretariat to service Agreement, deposit etc. - items included, for example, in the various UR WTO agreements]

Annex I - Electronic Goods

[Add positive list of electronic goods subject to the Agreement. This list would apply to all Members.]

Annex II -Treatment of Conformity Assessment Bodies

[Add positive list of electronic goods covered for each agency of the Member with respect to the obligations in III.F. Each agency and its covered products may be listed separately with respect to EMC and electrical safety.]

Annex III - Acceptance of SDoC

[Add positive list of electronic goods covered for each agency of the Member with respect to the obligations in III.H. Each agency and its affected products may be listed separately with respect to EMC and electrical safety. For example, SDoC accepted for x product with respect to EMC and for y product with respect to electrical safety.]

Annex IV – Acceptance of Third-Party Certification

[Add positive list of electronic goods covered for each agency of the Member with respect to the obligations in III.I. Each agency and its affected products may be listed separately with respect to EMC and electrical safety. For example, Third-Party Certification accepted for x product with respect to EMC and for y product with respect to electrical safety.]
