

**GENERAL AGREEMENT  
ON TARIFFS AND TRADE**

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**Group on Environmental Measures and International Trade**

**UNNECESSARY OBSTACLES TO INTERNATIONAL TRADE**

Note by the Secretariat

1. This note responds to a request to the secretariat from the Group at its meeting on 21 October 1993 to review the drafting history and subsequent use of the provision in the Tokyo Round Agreement on Technical Barriers to Trade (TBT Code) that "Parties ... shall ... ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade." (Article 2.1)

Drafting history

2. The origin of the provision is to be found in "The Draft Code" (Spec(72)3) which was drawn up during preparatory work for the Tokyo Round negotiations:

"III. Operative Provisions:

1. Preparation and adoption of mandatory standards by central government bodies:

(a) adherents shall ensure that mandatory standards are not such as to afford protection to domestic production."

This reference suggests that drafting was taking place at that time with the provisions of Article III:1 of the GATT in mind.

3. In March 1972, the Drafting Group on Standards elaborated on this language as follows:

"Adherents shall ensure that mandatory standards are not prepared with a view to affording protection to domestic production and that neither the standards themselves, nor the way in which they are applied, constitute an unnecessary obstacle to international trade." (Spec(72)18)

While the majority of the Drafting Group could agree to this language, some delegations expressed the view that it contained unacceptable loopholes and that a direct prohibition of the preparation, adoption or implementation of standards and quality assurance systems with protective effect, along the lines of Spec(72)3, should be retained. At this meeting it was also suggested that the Preamble to the Code should include "A statement emphasising that the Code in no way interferes with the responsibility of governments for the safety, health and welfare of their people or for the protection of the environment in which they live. It merely seeks to minimize the effect of such actions on international trade. Refer to Article XX and XXI of the General Agreement."

4. In July 1972 "Working Group 3: Standards" discussed the phrase "neither the standards themselves, nor the way in which they are applied, constitute an unnecessary obstacle to trade" (Spec(72)77). It was suggested that this should relate not to obstacles to trade but to protection to domestic production, and that the phrase "nor are applied to afford such protection" should be added to the language reproduced in paragraph 3 above. It was agreed that if this were to be included, there should be an explanatory note to the provision giving more precision to the phrase "to afford protection", and that in this regard the secretariat should review the drafting history of the provision of Article III:1 of the GATT. It was also decided that further discussion of the relationship between this provision and Articles XX and XXI of the GATT would be taken up at a later stage in the context of the general question of whether any provision in the Code modified GATT rights or obligations.

5. No further discussion of these points was recorded during 1972 or 1973. However, the following reference was contained in a secretariat note "Non-tariff barriers arising in the field of standards - Background note for developing countries" (COM.TD/W/191):

"The basic objective of the Code is to ensure that standards ... and quality assurance systems are not formulated or applied in such a way as to cause unjustifiable obstacles to international trade."

6. In March 1974, document MTN/3E/W/11, prepared for Group 3(e) and entitled "Work on Task 15 - Draft Code on Standards", contained the following remarks:

"One of the main concepts, if not the principal concept, underlying the proposed code is the obligation to ensure: (a) that standards are not prepared, adopted or applied with a view to creating obstacles to international trade; and (b) that neither standards themselves nor their application have the effect of creating unjustifiable obstacles to international trade ....

In order to give effect to this general principle or prohibition against the creation of obstacles to international trade the proposed code proceeds to establish a number of procedural requirements ..., [and] at the same time, to regulate or minimize the possible adverse effects of the way in which standards may be applied or administered."

7. In October 1974, document MTN/3E/W/26, prepared for Group 3(e) and entitled "Some aspects of the applicability of the draft code on standards to agriculture", contained the following remarks:

"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 a particular measure 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.

... the [effect 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 measures may entail.

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.

... 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).

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."

8. In March 1976, the following language was included in a new draft text:

"Adherents shall ensure that technical regulations are not prepared, adopted or applied with a view to creating obstacles to international trade. They shall likewise ensure that neither technical regulations themselves nor their application have the effect of creating an unjustifiable obstacle to international trade."

9. Between March 1976 and March 1977, two proposals were made to alter the second sentence of this provision. One proposal was that it should read: "... the effect of creating obstacles to international trade which are disproportionate to the legitimate objectives of the regulations concerned"; the second was that it should read: "... the effect of creating obstacles to international trade which are unnecessary for the achievement of the objectives of the technical regulations concerned" (MTN/NTM/W/50). Neither proposal was accepted. However, in March 1977 it was agreed to replace the phrase "an unjustifiable obstacle" by "unnecessary obstacles" (MTN/NTM/W/93). This formulation, covering also voluntary standards, was adopted in the final text of the TBT Agreement.

#### Developments Since 1979

10. Although the obligation in Article 2.1 of the TBT Agreement for Parties not to create "unnecessary obstacles to international trade" has been referred to on numerous occasions in meetings of the TBT Committee since 1979 with respect to the legislation of individual signatories, there has never been a collective attempt by signatories to provide guidance on the meaning of the term. Nor has the term ever been the subject of formal examination by a dispute panel.