

## II. Trade and public policies: A closer look at non-tariff measures in the 21<sup>st</sup> century

The *World Trade Report 2012* ventures beyond tariffs to examine other policy measures that can affect trade. Regulatory measures for trade in goods and services raise new and pressing challenges for international cooperation in the 21<sup>st</sup> century. More than many other measures, they reflect public policy goals (such as ensuring the health, safety and well-being of consumers) but they may also be designed and applied in a manner that unnecessarily frustrates trade. The focus of this report is on technical barriers to trade (TBT), sanitary and phytosanitary (SPS) measures (concerning food safety and animal/plant health) and domestic regulation in services.



# A. Introduction

Non-tariff measures that can potentially affect trade in goods present the multilateral trading system with a basic policy challenge – how to ensure that these measures meet legitimate policy goals without unduly restricting or distorting trade. The same challenge applies to measures that can affect trade in services. This introduction discusses how the motivations for using non-tariff measures and services measures have evolved, complicating the policy panorama, but not changing the core challenge of how to manage the tension between public policy goals and trading opportunities.

## 1. What is the *World Trade Report 2012* about?

### (a) Perspectives and insights in the *World Trade Report 2012*

This year's *World Trade Report* ventures beyond tariffs to investigate other policy measures that can affect trade. Since the birth of the General Agreement on Tariffs and Trade (GATT) in 1948, tariffs have been progressively reduced and “bound”.<sup>1</sup> Some tariffs still represent significant barriers to trade, but attention is progressively shifting to non-tariff measures (NTMs), such as technical barriers to trade, subsidies or export restrictions. Measures affecting trade in services have also come under greater scrutiny, reflecting the fact that services have increased their share of global trade while the complementarity between trade in goods and services has become more apparent, especially in international supply chains. This report seeks to deepen our understanding of the incidence, role and effects of NTMs and services measures, and to offer new insights into the scope for further international cooperation in these areas.

Non-tariff measures are nothing new. They have raised policy concerns since the establishment of the GATT. Such measures can dilute or even nullify the value of tariff bindings and affect trade in unpredictable ways. Drafters of the GATT included general rules covering broad categories of measures, such as Article XI on the general elimination of quantitative restrictions, which applies to border measures, and the “national treatment” obligation under Article III (i.e. granting equal treatment to imported and “like” domestic products), which applies to behind-the-border measures. Over time, more specific disciplines were negotiated, such as those applying to technical barriers to trade (TBT) or sanitary and phytosanitary (SPS) measures (i.e. food safety and animal and plant health measures). Services measures made their entry into the multilateral trading system in the Uruguay Round, which got under way in 1986. They are covered by the General Agreement on Trade in Services (GATS), which distinguishes between limitations to market access and national treatment, on the one hand, and domestic regulation on the other.

Both non-tariff measures and services measures continue to raise challenges for international cooperation in trade in the 21<sup>st</sup> century. Four broad considerations underpin the analysis of this report.

First, non-tariff measures and services measures tend to be opaque and driven by a variety of considerations. They are diverse in character and this diversity translates into highly variable trade and welfare effects. Moreover, not only do measures themselves affect trade, so too does the manner in which they are applied. Understanding, assessing and comparing

these effects is not only crucial for a sound policy strategy, but also from the perspective of international cooperation. Efforts to increase the transparency of NTMs, however, meet with a number of challenges. Better data on NTMs and services measures are needed to inform both our understanding of NTMs and the policy preferences that drive them.

Secondly, the mix of non-tariff measures is constantly changing. For example, when some measures are subjected to strict disciplines, a temptation may arise to replace them with other, less regulated measures. Similar forces may be at work in trade in services, although there is very little evidence in this area. Such “policy substitution” raises a number of challenges which are addressed in the Report. This is the context in which a protectionist use of NTMs is most likely to be encountered.

Thirdly, changes in the trading environment alter both the need for non-tariff measures and services measures and the nature of government incentives to use them. The Report discusses the challenges raised by developments such as the growth in global production networks, the recent financial crisis, the need to address climate change, and growing consumer concerns regarding food security and environmental issues in rich countries. The increasing number of reasons for using NTMs reflects a move away from a focus on the production side of the equation towards the defence of consumer and societal interests.

Fourthly, when it comes to international trade and trade-related policies, the greater use of non-tariff measures and their increasing complexity in terms of design and purpose have intensified the challenge of securing effective and stable international cooperation. These issues are discussed in the Report, including with respect to international convergence, private standards and domestic regulation in services.

Because of the diversity and complexity of non-tariff measures and services measures, the Report focuses on TBT and SPS measures in trade in goods, and on domestic regulation in trade in services. TBT/SPS measures are now among the most frequently encountered NTMs. By their very nature, they pose acute transparency problems, both in their formulation and administration. More than any other NTMs, TBT/SPS measures prompted by legitimate public policy objectives can have adverse trade effects, leading to questions about the design and application of these measures. They are also at the forefront of tensions that can arise over producer-driven and consumer-driven NTMs. Essential policy aspirations, such as ensuring the health, safety and well-being of consumers, for example, may have adverse trade effects considered by some parties as indefensible on public policy grounds.

To address the adverse effects on trade caused by TBT and SPS measures, international cooperation takes the form of regulatory convergence. This occurs in many different forms and at various levels. At the multilateral level, it raises a number of new challenges for the WTO that are discussed in this report. Some of those challenges are specific to developing countries, where capacity building rather than preferential treatment in the form of lower tariffs can help to address them. Domestic regulation in services raises the same challenges. As spelled out in the next subsection, these include regulations on licensing/qualification requirements and procedures as well as technical standards.

### (b) Terminology

Lawyers, economists and other social scientists sometimes use similar terms to refer to different concepts, while at other times they use different terms to refer to similar concepts. For example, in WTO law, a standard is non-mandatory by definition (see TBT Agreement, Annex 1:2), while for economists, standards can be either mandatory or voluntary. Some terms have a specific definition in WTO law. For example, the term “measure” refers to actions and “non-actions” by the private sector and governmental bodies, while the term “regulation” is limited to governmental action and excludes private sector measures.

In this report, “non-tariff measures” refer to policy measures, other than tariffs, that can potentially affect trade in goods. “TBT/SPS measures” include all measures covered by the WTO’s TBT and SPS agreements. It therefore includes technical regulations, standards and conformity assessment procedures (as defined in Annex 1 of the TBT Agreement) and the SPS measures listed in Annex A, paragraph 1, of the SPS Agreement. Whenever the discussion excludes any governmental actions, the term “private measures” is used.

“Services measures” refer to all measures that can affect trade in services. Services measures listed under GATS Article XVI:2 are referred to as “market access limitations”. “National treatment restrictions” are services measures that accord services suppliers of another WTO member less favourable treatment than that accorded to the WTO member’s own “like” services suppliers (as of GATS Article XVII). Finally, “domestic regulation in services” includes licensing and qualification requirements and procedures, and technical standards (as of GATS Article VI:4 negotiating mandate). Exceptions to these definitions may be made from time to time when citing non-WTO research and/or databases that define their terms differently. In such cases, the source’s terms may be used, but any non-standard terminology is clearly identified.

The terms “non-tariff measures” and “services measures” distinguish between policy measures that affect trade in goods and those that affect trade in services respectively. In reality, the two categories of measures are not mutually exclusive. Certain services measures also affect trade in goods and thus should also be considered as NTMs. Conversely, certain NTMs affect trade in services. Such “cross-effects” may continue to grow in importance with the transformation of trade patterns and the expansion of global production sharing, but very little empirical evidence exists on their significance. The Report also discusses the relevance of “complementarity effects”, namely the mutually reinforcing effect of trade in goods and services.

### (c) Structure of the Report

Section B examines the reasons why governments use non-tariff measures and to what extent these measures, which may be pursued for a variety of policy purposes, can have adverse trade effects. Similar questions are also addressed for services measures. It is argued that governments use NTMs to address various types of market failures or to pursue public policy objectives, but do so sometimes in ways that respond to the influence of special-interest groups. The opaqueness – in terms of purpose and effects – of certain NTMs, their appeal in the presence of domestic institutional and political constraints, as well as their effects on fixed and variable trade costs can explain why governments may give preference to economically inefficient measures or to protectionist measures in disguise.

Section B also considers whether, and how, the phenomenon of offshoring provides additional motivations for governments to distort domestic policies. Moreover, it analyses governments’ choice of alternative measures. The reasons for government intervention, and the potential for adverse trade effects, are also discussed with reference to services measures. The section ends by presenting case studies on NTMs applied in the context of climate change and food safety, and investigates to what extent measures taken may pose a challenge to international trade.

Section C surveys available sources of information on non-tariff measures and services measures and evaluates their relative strengths and weaknesses. It also summarizes the contents of the main databases containing information on NTMs and services measures and uses this information to establish a number of “stylized facts”, first about NTMs and then about services measures. Establishing those stylized facts turns out to be surprisingly difficult due to large gaps in the availability of data on both NTMs and services measures and to numerous shortcomings in existing datasets. Despite these limitations, many key features of the current regulatory landscape are

captured and a number of important trends in the use of NTMs over time are documented.

Section D discusses the magnitude and the trade effects of non-tariff measures and services measures in general before focusing on TBT and SPS measures and domestic regulation. Due to lack of transparency, as well as the importance of administrative behaviour in determining the impact of interventions, it is difficult to measure the effects of NTMs compared with those of tariffs. *Ad valorem* equivalents need to be calculated before making any comparison. However, various methodological challenges and shortcomings plague such calculations. Likewise, conceptual and methodological challenges arise in the calculation of tariff equivalents of services measures.

To the extent possible, the trade effects of TBT and SPS measures and of domestic regulation in services are disentangled in several dimensions, including the specific channel through which trade is affected, the effects across countries, sectors and firms, and the effects of the implementation of a measure, distinct from the effects of the design of the measure itself. Finally, the section examines whether regulatory harmonization and/or mutual recognition of standards help to reduce any trade-hindering effects of TBT and SPS measures and domestic regulation in services.

Section E covers international cooperation on non-tariff measures and services measures. The first part reviews the economic rationale for such cooperation in the context of trade agreements. It provides a framework for evaluating the efficient design of rules on NTMs in a trade agreement. The second part of this section looks at cooperation on TBT/SPS measures and domestic regulation in practice, both in the multilateral trading system and within other international fora and institutions. The third part of the section deals with the legal analysis of the treatment of NTMs in the GATT/WTO system and the interpretation of the rules that has emerged in recent international trade disputes. Special attention is devoted to how WTO agreements and dispute settlement have dealt with the distinction between legitimate and protectionist NTMs. The section concludes with a discussion of the challenges for improving and fostering further multilateral cooperation on NTMs and services measures.

## 2. History of NTMs in the GATT/WTO

Non-tariff measures have always presented the multilateral trading system with a basic policy challenge – how to ensure that NTMs do not restrict or distort trade, and at the same time ensure that they can be used for necessary and legitimate policy goals. While the policy challenge has remained the same, the specific issues, debates and solutions have evolved over time.

In the early GATT years, the main focus was on measures related to balance-of-payments, employment and development issues. More recently, the focus has been on the growing number of measures related to technical, health or environmental concerns. Whereas non-tariff measures in the past were often driven, or influenced in terms of design, by producer interests, today's NTMs reflect a greater diversity in public policy concerns, including consumer interests.

Deepening economic integration and the expansion of trade rules into new areas, such as agriculture, services and intellectual property, have added to the complexity of the debate – generating new trade frictions over domestic regulatory differences, drawing new constituencies, such as environmentalists and consumer groups, into the debate (Daly and Kuwahara, 1998; Low and Yeats, 1994) and raising new concerns about the tension between international rules and policy sovereignty. In response to these changing issues and pressures, the multilateral trading system continues to evolve. If in the past, the focus was on national measures – ensuring non-discrimination and transparency, while avoiding protectionism – in recent decades there has been a growing focus on transnational measures – encouraging regulatory cooperation, mutual recognition agreements and the international harmonization of standards.

Although the GATT was launched as a tariff agreement – and its early decades were focused mainly on the negotiation and “binding” of tariff reduction – the issue of non-tariff measures was unavoidable from the outset. Originally envisaged as one part of a future International Trade Organization (ITO), the GATT was the product of an initial tariff reduction negotiation among 23 countries that concluded in October 1947 – just in time to avoid the expiration of US negotiating authority, and six months in advance of the planned conclusion of the parallel ITO negotiations (Gardner, 1956).

To ensure that the agreed tariff reductions were not diluted or undercut by other trade measures, the GATT incorporated many of the commercial policy provisions of the draft ITO Charter.<sup>2</sup> Even this step was viewed sceptically by the US Congress, since the 1945 extension of the reciprocal trade agreements authority only authorized undertakings to reduce tariffs and other trade restrictions. The GATT's general clauses passed scrutiny only because they were justified as a necessary backstop to any tariff-reduction agreement (J. H. Jackson, 1989). When it became clear by 1950 that the Havana Charter establishing the ITO would not be ratified by the United States, it fell to the GATT to assume the commercial policy role that had been envisaged for the ITO – but without its organizational or procedural provisions, and minus the chapters on “Employment and Economic Activity”, “Economic Development and Reconstruction”, “Restrictive Business Practices” and “International Commodity Agreements”.

From a trade-opening perspective, the GATT drew a basic policy distinction between tariff and non-tariff measures. In particular, it favoured the use of tariffs. In addition to being revenue generating, tariffs were viewed as a "fairer" form of protection, more efficient in terms of their economic consequences and more amenable to reductions through negotiations. Quantitative restrictions and other non-tariff measures were seen as inherently more discriminatory, more varied and more disruptive of market forces.<sup>3</sup>

In principle, US negotiators took a more extreme view of non-tariff measures, claiming to want to prohibit all quantitative restrictions and most other non-tariff barriers to trade – under a comprehensive code governing world trade – and to initiate international negotiations to reduce tariffs (although the United States was also intent on protecting the quotas and restrictions that buttressed its own agricultural support programmes). However, other countries were just as intent on preserving their freedom to use quantitative restrictions, exchange controls and other NTMs for domestic policy purposes.

The United Kingdom and other European countries faced serious balance-of-payments difficulties at the end of the Second World War, and were unprepared to give up trade and exchange controls that they believed were needed to preserve macroeconomic stability. Under the influence of Keynesian economics and its wartime experience, the United Kingdom was intent on preserving its freedom to use trade restrictions in the pursuit of domestic "full employment". Meanwhile, developing countries resisted interference in their ambitious efforts to devise more stable international commodity agreements or to pursue domestic development and industrialization strategies. Thus, the negotiations leading to the Havana Charter for the planned International Trade Organization were dominated by intense debates about non-tariff measures – and quantitative restrictions, in particular – as nations struggled to construct a universal legal system that could also encompass their often conflicting domestic objectives and interests.

Given the complicated negotiating history on non-tariff measures, the variety of forms they took and the fact that many measures had a policy intent only indirectly related to trade, the GATT's architects failed to arrive at a comprehensive approach encompassing all non-tariff measures and treated various types of measures differently. Consistent with the GATT's basic policy thrust, certain NTMs were prohibited outright. Quantitative restrictions were the most important non-tariff measures when the GATT was being drafted, so it is not surprising that they are subject to detailed and complex provisions.

Article XI of the GATT clearly prohibited the introduction of new quantitative restrictions and required the elimination of existing ones, but this rule

was subject to three main exceptions. Reflecting Europe's balance-of-payments and currency concerns, the most important exception was for quantitative restrictions (and exchange controls) maintained for balance-of-payments purposes, detailed in Articles XII to XV. The second exception was for quantitative restrictions used in support of certain agricultural support programmes that aimed to keep domestic prices above world prices – a key objective of the United States. The third exception was limited to quantitative restrictions used by least-developed countries (LDCs) to promote infant industries and economic development, or to manage their own particular foreign exchange problems.

Other non-tariff measures were regulated, not prohibited, by GATT rules to ensure that necessary and legitimate domestic policies were non-discriminatory and least trade restrictive. The basic "national treatment" obligation, Article III, outlawed internal taxes or charges on imported products that were not applied equally to "like" domestic products. National treatment also required that domestic laws and regulations related to sales, purchases, transportation and distribution be non-discriminatory in their application. Although the GATT made no specific reference to technical or health standards, Article III's coverage of "laws, regulations, and requirements" was generally assumed to apply.

Significantly, Article XX explicitly recognized that measures "necessary to protect human, animal or plant life and health" were justified – confirming governments' responsibility for ensuring that goods of all kinds meet certain national standards – but only so long as these measures met the "necessity" standard, and did not "constitute a means of arbitrary or unjustified discrimination or a disguised restriction on international trade". The GATT also regulated certain non-tariff measures in an affirmative way through its Article X requirement that import-related laws, judicial decisions and regulations be "published promptly".

Other non-tariff measures were considered too complex or controversial to be addressed through general rules or "codes of conduct" alone. Article VI established rules regarding anti-dumping and countervailing duties – which were allowed only in certain prescribed cases, and at levels deemed sufficient to accomplish approved objectives. Article VII specified that customs valuation systems should not be based "on arbitrary or fictitious values" assigned to imports. Article VIII aimed to limit administrative fees assigned to imports and tried to simplify the documentation required by customs officials. Article IX sought to prevent discriminatory restraints on imports through the use of rules of origin (i.e. procedures which determine a product's country of origin and consequently how it is treated). Often the scope or coverage of such agreements was limited. On subsidies, for example, GATT Article XVI merely

required notification and consultation, with a view to reducing subsidization. Although the United States and several other delegations viewed state trading activities – which were widespread during the Second World War and its aftermath – as a significant trade distortion, GATT rules (Articles II:4, III:4 and XVII) did not prohibit state trading agencies but simply required that their purchases and sales be subject to market forces.

To further protect bound tariff reductions from being unfairly undermined by non-tariff measures, the original GATT architects also introduced an expansive and controversial “non-violation” provision<sup>4</sup> – under Article XXIII:1 of the dispute settlement procedure – which allowed a WTO member to argue, even in the absence of any breach of GATT obligations, that its market access “benefits” had been nullified or impaired by “any measure” introduced by another member, or by “any other situation”, and to seek compensation. The inherent ambiguity of the non-violation provision was intentional, designed to cover not only government NTMs that fell outside the scope of existing GATT provisions, but measures that governments might invent in the future to circumvent or dilute their tariff commitments.

The first five GATT negotiating rounds – Geneva (1947), Annecy (1949), Torquay (1951), Geneva (1956) and Dillon (1960-61) – were devoted almost exclusively to tariff negotiations and the accession of new members. However, during the 1954-55 “review session”, members separately drafted protocols revising several GATT provisions dealing with non-tariff measures. While these early rounds, especially the first one, resulted in significant overall tariff reductions, the trade-opening impact was often frustrated by countries’ use of non-tariff measures – further increasing the pressure on the GATT system to clarify the distinction between protectionist and legitimate NTMs. Most European countries were still applying a range of quantitative restrictions, although less for balance-of-payments reasons,<sup>5</sup> and increasingly to limit growing import competition from Asia, especially Japan, which had recently acceded to the GATT.

Concerns were also growing about the expansion of anti-dumping actions, especially by the United States and Canada, and the lack of rules governing the use and application of national technical, health and safety standards. The negotiation of the 1962 Long-Term Arrangement Regarding International Trade in Textiles (LTA) – which embodied a complex network of restrictions on textiles and clothing exports – went some way towards appeasing industrial lobbies and helped the US administration secure congressional negotiating authority for what became the Kennedy Round (Low, 1993). However, there were growing worries, especially among developing countries, about the extent to which such “voluntary” arrangements

were substituting trade regulation for markets and weakening the intent, if not the rules, of the multilateral trading system. In these and other areas, it was becoming clear that GATT rules often failed to give sufficiently precise guidance for the international regulation of non-tariff measures. The problem was made worse by the GATT’s “Protocol of Provisional Application”, which required countries to respect Part II rules – i.e. those covering non-tariff measures – only “to the fullest extent not incompatible with existing legislation” (Dam, 1970; J. H. Jackson, 1989). As a result, non-tariff measures that could be related to national legislation in existence prior to 1947 effectively “escaped” the GATT’s disciplines.

By the time the Kennedy Round was launched in 1964, pressure was building from governments to address a broad range of non-tariff measures, including those falling under the “escape clause”, “residual” quantitative restrictions, anti-dumping, state trading, government procurement, customs valuation, discriminatory import restrictions, border tax adjustments, and increasingly technical and health standards.<sup>6</sup> At a meeting in May 1963, preparing the ground for the Kennedy Round, trade ministers agreed that the forthcoming negotiations “should deal not only with tariffs but also with non-tariff barriers”.<sup>7</sup>

Unfortunately, the Kennedy Round’s success in grappling with non-tariff measures was limited. An initially positive result was an agreement on anti-dumping measures, the so-called “Anti-dumping Code”, aimed at speedier and more transparent procedures in the application of national anti-dumping laws.<sup>8</sup> The Code was negotiated separately from the Round’s tariff negotiations, and agreement was reached with surprisingly little difficulty (Winham, 1986). Another positive result was an American Selling Price (ASP) agreement, whereby the United States would have ended its use of a valuation system for benzenoid chemicals that Europe claimed was incompatible with the GATT, and the European Communities would have provided additional tariff reductions on chemicals and other trade concessions (J. H. Jackson, 1989).

The anti-dumping and ASP agreements represented important potential progress in the regulation of non-tariff measures. However, even before the conclusion of the Kennedy Round in 1967, opponents in Congress argued that both agreements had been negotiated without an explicit congressional mandate, and a bill was subsequently passed prohibiting the US Tariff Commission from implementing the codes (Winham, 1986). The agreements died as a result (Destler, 1986). Although the Kennedy Round was again successful in reducing tariffs, it did not bring about any significant changes to the GATT rules governing NTMs (Preeg, 1995).

It fell to the Tokyo Round between 1973 and 1979 to undertake a major reform and expansion of the GATT’s

non-tariff rules – in many ways picking up where the Kennedy Round had left off. Despite the GATT's success in lowering tariffs, members were increasingly aware that tariff reductions alone were not sufficient to guarantee market access. Concerns were again expressed that non-tariff measures were frustrating the intent of tariff commitments, and that existing GATT rules were in some cases not precise or detailed enough to ensure that certain NTMs were not discriminatory or unnecessarily trade restrictive. This view was especially prevalent in the United States, which was already worried about the effects on its exports of an overvalued dollar and the consolidation of the European common market.

The United States Commission on International Trade and Investment, the so-called "Williams Commission", appointed in 1971 to advise the administration on future trade policy, stressed that American exports were being increasingly impeded by "non-tariff barriers" in overseas markets, and proposed the launch of new multilateral negotiations which, among other things, would draw up "codes of conduct" to address non-tariff issues. In seeking congressional negotiating authority in 1973, the US Special Trade Representative, William Eberle, argued that "the forthcoming trade negotiations must differ substantially from those of the past ... The negotiations must cover *all barriers* which distort trade".

The Europeans, for their part, wanted to return to issues that they had unsuccessfully pushed during the Kennedy Round, especially customs valuation (and the removal of the ASP), anti-dumping and government procurement (Winham, 1986). The growing importance of non-tariff measures was further highlighted by a Non-Tariff Measure Inventory that had been compiled by the GATT Secretariat, based on members' reverse notifications, since 1967.

The Tokyo Round gave centre stage to the negotiation of improved and expanded rules on non-tariff measures. In the ministerial declaration launching the Round, a key stated objective was to "reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline". Reflecting this priority, the Trade Negotiations Committee created a special negotiating sub-committee on non-tariff measures in February 1974; this committee was itself divided into sub-groups on quantitative restrictions, technical barriers to trade, customs matters, subsidies and countervailing measures, and (after July 1976) government procurement. The main outcome of their efforts was the negotiation of six new plurilateral agreements – or "codes" – which, with the exception of government procurement, built on existing GATT provisions. Despite their limited membership – for example, just 39 countries, a third of the GATT membership, opted

to sign the Technical Barriers to Trade Code (also referred to as the Standards Code) at the end of the Round – these agreements marked a significant advance in the system's efforts to clarify rules in a number of non-tariff areas.

The Customs Valuation Code brought greater uniformity and standardization to the way that imports were valued. New rules in the Import Licensing Code reduced the scope for discrimination in the way that customs authorities could apply licences. The codes on government procurement and subsidy/countervail were also important breakthroughs in the Tokyo Round – the former because it brought a major new area of economic activity under GATT rules, the latter because it demonstrated the willingness of countries to negotiate on an increasingly high-profile and contentious non-tariff measure (Winham, 1986).

As a clear signal of the way that the fast-expanding array of domestic technical, health and safety non-tariff measures would be addressed by GATT rules in the future, the new Standards Code was arguably one of the most significant and important Tokyo Round results. Not only did the Code explicitly reiterate the GATT's existing non-discrimination obligations regarding the administration of technical regulations, it also obliged countries to adopt existing internationally accepted standards – unless inappropriate for defined reasons – while urging them to work towards the further harmonization of standards. Furthermore, the Code encouraged countries to adopt a "mutual recognition" policy, whenever possible, for test results, certificates and marks of conformity.

Although the Tokyo Round's tariff reduction agreement was significant, the Round's main achievement was the development of a comprehensive regime for non-tariff measures. The Tokyo Round codes were not without weaknesses – some of which were to provide an impetus for launching the Uruguay Round negotiations. Since the codes' membership was limited, they were sometimes accused of not being fully "multilateral", of creating a two-tiered GATT, and of weakening the principle of non-discrimination. The codes' separate committees, provisions and dispute settlement procedures also open them to the charge of "balkanizing" the multilateral trading system. Some of these concerns were addressed in the November 1979 GATT Decision, which affirmed that these agreements (except government procurement) would be applied in a manner fully consistent with most-favoured nation (i.e. non-discrimination), so non-signatories preserved their existing rights.

The Decision also secured the right of non-signatories to participate in the various code committees as observers – addressing a concern of developing countries. Despite these shortcomings, the Tokyo Round clearly marked the most significant advance in the system's efforts to deal with non-tariff measures

since the GATT's rules were first negotiated after the Second World War.

Non-tariff measures remained a main focus of the Uruguay Round – in part to build and expand upon what had been achieved in the Tokyo Round. The 1986 Punta del Este Declaration, launching the Round, provided a broad mandate: “negotiations shall aim to reduce or eliminate non-tariff measures, including quantitative restrictions”. Japan, the first country to formally propose launching the new Round, specifically sought strengthened GATT disciplines on NTMs, especially voluntary export restraints and other managed trade arrangements (Croome, 1996). The United States, for its part, not only sought improved market access for its manufactured and agricultural exports, but expanded opportunities for its increasingly competitive services exports, and to strengthen foreign protection and enforcement of its intellectual property rights – all of which involved a much broader focus on non-tariff measures than had been envisaged in the past.

Like the United States, the European Communities also had an interest in opening up services trade and strengthening intellectual property protection. Meanwhile, a critical mass of developing countries were prepared to contemplate new services and intellectual property rules in exchange for improved access to developed-country markets for their manufactured exports, including by dismantling the Multi-Fibre Arrangement (which had replaced the LTA in 1974), amending the safeguard clause, and generally strengthening the GATT's non-discriminatory rules.

The Uruguay Round marked another major expansion of the system's coverage of non-tariff measures. The widening of multilateral rules to include services trade and intellectual property protection – through the GATS and the Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement – involved new disciplines across a whole range of measures. However, these were not the only areas where the Uruguay Round expanded international regulation of NTMs.

Agricultural trade had largely been exempted from previous GATT negotiations and the use of non-tariff measures, such import quotas and subsidies, in agricultural policy had enjoyed special status under GATT rules. Under the Uruguay Round's agriculture agreement, however, most remaining non-tariff restrictions were replaced by tariffs – a process known as tariffication – and new commitments were undertaken to discipline domestic support and export subsidies. In addition to improvements to the Technical Barriers to Trade Agreement, a new Sanitary and Phytosanitary Measures Agreement was negotiated dealing specifically with agriculture-related standards. By treating sanitary and phytosanitary (SPS) measures under a separate (and more rigorous) agreement,

negotiators not only acknowledged the growing importance and prominence of food safety issues – and their increasing relevance to agricultural trade – but also the possibility that countries might be tempted to compensate for negotiated tariff and subsidy reductions through increased use of SPS measures (Croome, 1996).

GATT disciplines on import licensing and rules of origin were also strengthened, while existing rules on subsidies – including their classification into prohibited, permissible and possibly permissible subsidies – were expanded. Countries also agreed to dismantle progressively the Multi-Fibre Arrangement, which had evaded GATT rules since 1962, ending one of the most prominent and controversial trade arrangements.

The changing focus and scope of each round of GATT negotiations since 1947 not only reflects the on-going relevance of non-tariff measures to the international trading system, but also how the relative importance of various measures has shifted over time (see Table A.1). Quantitative restrictions were the most pressing problem facing the early GATT negotiators because countries were slow to dismantle wartime controls and Europe was preoccupied with balance-of-payments problems and dollar shortages. However, these gradually diminished in importance during the 1950s as the dollar shortage resolved itself and as import and exchange controls were lifted.

Later, during the Kennedy Round, attention increasingly turned to customs valuation anomalies, anti-dumping actions, and the expansion of trade agreements between countries. Notwithstanding the efforts made to address these issues during the Round, quantitative restrictions and embargoes still accounted for more than a quarter of the non-tariff measures notified in the 1968 inventory and continued to be relevant after the Uruguay Round. Rising trade conflicts over production subsidies and health and safety standards were added to the list of emerging problems during the Tokyo Round (i.e. 6.6 per cent and 9.2 per cent of the measures notified in the 1973 inventory). During the Uruguay Round, discussions on NTMs expanded dramatically to include the host of domestic regulations related to services and intellectual property, in addition to the wide array of agriculture and textile measures that had previously been exempt from GATT rules.

In the current Doha Round, “standards” and “customs and administrative procedures” have re-emerged as the two most important categories of non-tariff measures being addressed in the negotiations on manufactured products (NAMA, or non-agricultural market access) and trade facilitation (at 37.6 per cent and 26.5 per cent respectively, these were among the top three categories of NTMs notified in the 2005 inventory). The fact that the GATT's transit, administrative and transparency provisions (Articles V, VIII and X), largely neglected in

Table A.1: Non-tariff measures notified by GATT/WTO members for non-agricultural products  
(share of NTMs by inventory category)

Parts and sections	DESCRIPTION	Inventory (1968) <sup>1</sup>	Inventory (1973) <sup>2</sup>	Inventory (1989) <sup>3</sup>	NAMA, 1 <sup>st</sup> Inv. (2003) <sup>4</sup>	NAMA, 2 <sup>nd</sup> Inv. (2005) <sup>5</sup>
<b>Part I</b>	<b>Government participation in trade and restrictive practices tolerated by governments</b>	<b>11.9</b>	<b>15.3</b>	<b>20.9</b>	<b>7.1</b>	<b>7.0</b>
A	Government aids	2.7	6.6	7.3	1.8	1.7
B	Countervailing duties	0.6	0.4	0.5	0.2	0.0
C	Government procurement	3.7	3.4	6.4	0.9	0.7
D	Restrictive practices tolerated by governments	0.0	0.8	2.0	3.8	4.3
E	State trading, government monopoly practices, etc.	4.9	4.1	4.6	0.4	0.3
<b>Part II</b>	<b>Customs and administrative entry procedures</b>	<b>14.8</b>	<b>14.6</b>	<b>11.9</b>	<b>23.5</b>	<b>26.2</b>
A	Anti-dumping duties	1.1	1.5	2.3	1.5	2.3
B	Valuation	5.5	4.8	4.1	2.3	5.3
C	Customs classification	1.3	0.7	0.5	0.7	3.3
D	Consular formalities and documentation	4.7	6.4	3.4	2.3	3.0
E	Samples	0.7	0.4	0.2	0.1	0.0
F	Rules of origin	1.3	0.0	0.4	7.4	2.6
G	Customs formalities	0.2	0.8	1.1	9.1	9.6
<b>Part III</b>	<b>Technical barriers to trade</b>	<b>6.1</b>	<b>9.2</b>	<b>8.2</b>	<b>29.9</b>	<b>37.1</b>
A	General	0.0	9.2	1.6	3.2	8.9
B	Technical regulations and standards	5.2	0.0	3.0	15.8	13.2
C	Testing and certification arrangements	0.9	0.0	3.6	11.0	14.9
<b>Part IV</b>	<b>Specific limitations</b>	<b>36.7</b>	<b>31.5</b>	<b>31.7</b>	<b>34.9</b>	<b>26.8</b>
A	Quantitative restrictions and import licensing	20.7	15.6	13.9	12.8	7.0
B	Embargoes and other restrictions of similar effect	5.0	5.6	5.3	0.8	4.0
C	Screen-time quotas and other mixing regulations	1.9	3.6	1.6	0.0	0.7
D	Exchange control	2.3	1.2	1.2	1.3	1.3
E	Discrimination resulting from bilateral agreements	0.8	1.5	1.1	0.1	0.7
F	Discriminatory sourcing	0.5	1.0	0.0	0.3	1.7
G	Export restraints	1.6	0.4	0.4	0.2	1.0
H	Measures to regulate domestic prices	1.6	0.5	1.2	0.2	0.3
I	Tariff quotas	0.2	0.3	0.5	0.3	1.3
J	Export taxes	0.0	0.0	2.1	0.2	1.0
K	Requirements concerning marking, labelling and packaging	1.6	1.6	2.1	7.2	6.3
L	Other specific limitations	0.3	0.1	2.1	11.5	1.7

Parts and sections	DESCRIPTION	Inventory (1968) <sup>1</sup>	Inventory (1973) <sup>2</sup>	Inventory (1989) <sup>3</sup>	NAMA, 1 <sup>st</sup> Inv. (2003) <sup>4</sup>	NAMA, 2 <sup>nd</sup> Inv. (2005) <sup>5</sup>
<b>Part V</b>	<b>Charges on import</b>	<b>29.2</b>	<b>29.4</b>	<b>27.3</b>	<b>4.4</b>	<b>1.7</b>
A	Prior import deposits	1.9	1.9	1.6	0.2	0.0
B	Surcharges, port taxes, statistical taxes, etc.	13.5	10.5	10.5	3.0	1.3
C	Discriminatory film taxes, use taxes, etc.	11.1	4.0	4.5	0.2	0.3
D	Discriminatory credit restrictions	1.3	1.4	1.2	0.2	0.0
E	Border tax adjustments	0.9	11.2	8.6	0.2	0.0
F	Emergency action	0.5	0.4	0.9	0.8	0.0
	<b>Other</b>	<b>1.4</b>	<b>0.0</b>	<b>0.0</b>	<b>0.2</b>	<b>1.3</b>
	<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>
	<b>Memo: Number of items in the categories</b>	<b>873</b>	<b>731</b>	<b>561</b>	<b>2556</b>	<b>302</b>

Source: Santana and Jackson (2012).

Note: The information presented in this table is largely based on “reverse” notifications according to the inventory categories in document TN/MA/S/5. Because the categories used in each of the inventories differ, several elements had to be adjusted as described below. Where an item corresponded to two or more inventory categories, the item was counted under all the relevant categories. This means that the number of items presented in this table overestimates the actual number of items in the inventory.

<sup>1</sup> Based on the Inventory on Non-Tariff Measures of the Committee on Industrial Products, document COM.IND/6 and Addenda, of 11 December 1968. The categories of this inventory diverge considerably from the ones used for this table. The frequency of measures was grouped and reassigned accordingly. Some of the differences include *inter alia.*: countervailing duties were classified under Part II (customs and administrative procedures) and not under Part I; the “customs classification” of II.B did not exist, but there were categories for “Harmonization of Nomenclature” and “Arbitrary classification”; consular formalities were included under Part II and not in Part I; quantitative restrictions and licensing requirements were presented as two separate items; marking and packaging requirements were classified under Part III (technical barriers to trade); the “restrictive practices tolerated by governments” were included in the “other” category, etc.

<sup>2</sup> Based on the Note by the Executive Secretariat of the GATT entitled “Inventory of Non-Tariff Measures – Balance sheet of notifications”, document COM.IND/W/102 of 11 April 1973. The inventory categories differ slightly from the ones used in this table. For example, in the 1973 inventory, Part III was entitled “Standards” and was sub-divided into: A) Industrial standards; B) Health and safety standards; C) Other standards concerning product contents; and D) Requirements concerning marking, labelling and packaging; the category of “export taxes” did not exist, etc.

<sup>3</sup> Based on the GATT’s Secretariat Analysis of the documentation of the Technical Group on Quantitative Restrictions and other Non-Tariff Measures, GATT Document NTM(TG)/W/5 of 28 February 1989, Annex 10 (QRs) and 12 (NTMs other than QRs).

<sup>4</sup> The summary is based on the WTO Secretariat’s report JOB(03)/128, which compiled information of notifications in the TN/MA/W/25 series. The second notification exercise notified by members in the TN/MA/W/46 series was not taken into account. Data was processed and rearranged in a manner that would allow for the counting of individual measures as per the inventory categories. Because several measures related to two or more inventory categories were notified, there is an overlap and multiple counting of the same measure. The WTO Secretariat noted in this report that information was often inaccurate or incomplete, to which the authors would add that the manner in which products were grouped also diverged, ranging from grouping of categories of products to identifying tariff lines at the ten-digit level. This summary should, therefore, be interpreted with caution.

<sup>5</sup> The summary is based on the WTO Secretariat’s report JOB(04)/62/Rev.7, which compiled information of notifications in the TN/MA/W/46 document series. The information notified by Brazil in document TN/MA/W/46/Add.16 was added. The same processing notes of document JOB(03)/128 apply.

previous rounds, are once again in the spotlight through the trade facilitation negotiations demonstrates how enduring the non-tariff measures agenda remains. In short, few of the non-tariff issues on the multilateral trade agenda are completely new or have completely disappeared.

If non-tariff measures are emerging as an even more critical focus of the WTO’s work, it is largely a reflection of the system’s successes, not its failings. The expansion of world trade, the deepening integration of economies, and the widening and strengthening of trade rules have inevitably resulted in non-tariff measures emerging as an increasingly salient feature of the international trade landscape. Declining tariff protection has led some countries to make more creative and extensive use of non-tariff

measures. Many countries, particularly in the developed world, have also expanded health, safety and environmental regulations in recent decades (Trebilcock and Howse, 1999) – whose trade impact is often magnified by cumbersome administrative and compliance procedures (as highlighted in Section C).

Another major reason why non-tariff measures have grown in prominence in the WTO is because the focus on them has increased – as the line between “foreign” and “domestic” issues and policies becomes increasingly blurred.<sup>9</sup> This development has also increased the complexity of the WTO’s work, since the system has historically found it harder to address NTMs than tariffs. This is partly because they are more complex and country-specific, partly because they do not easily lend themselves to negotiations that have traditionally

focused on the exchange of tariff reductions, but mainly because they can involve domestic policy objectives only indirectly related to trade.

Yet over the decades, the multilateral trading system has developed an increasingly effective means of regulating non-tariff measures – by prohibiting the most protectionist measures, by constraining discriminatory and unnecessarily trade-restrictive

measures, by strengthening general and specific transparency obligations, and by encouraging transnational regulatory cooperation and convergence – building on the GATT's surprisingly adaptable and "modern" foundations. This suggests that the future trade agenda, like the past one, will focus on refining and improving existing disciplines, while taking into account changing contexts as they arise, rather than starting anew in entirely uncharted waters.

# Endnotes

- 1 A tariff is "bound" when a WTO member has committed not to raise it above a legally agreed rate (the so-called tariff "binding").
- 2 The GATT's origins were also reflected in the agreement's structure and substantive obligations. Article I sets out the most-favoured nation (MFN) obligation, whereby members agree to apply tariffs on a non-discriminatory basis. Article II covers the tariff reductions schedules to which GATT members had agreed. Together, these two articles comprised Part 1 of the agreement. Part 2 of the GATT, Articles III to XVII, contains almost all of the GATT's other substantive obligations – the most important of which is national treatment (Article III), clearly aimed at preventing NTMs, especially domestic tax and regulatory policies, from being used as protectionist measures that would defeat the purpose of tariff bindings. In addition to national treatment, Part 2 also contains rules governing other NTMs, such as anti-dumping and countervailing duties, customs valuation, customs administration, rules of origin, quantitative restrictions and subsidies.
- 3 As Clair Wilcox, one of the US chief negotiators in Geneva, put it: "Quantitative restrictions ... impose rigid limits on the volumes of trade. They insulate domestic prices and production against changing requirements of the world economy. They freeze trade into established channels. They are likely to be discriminatory in purpose and effect. They give the guidance to public officials; they cannot be divorced from politics. They require public allocation of imports and exports among private traders and necessitate increasing regulation of domestic business. Quantitative restrictions are among the most effective methods that have been devised for the purpose of restricting trade" (Wilcox, 1949).
- 4 The parting South African delegate to the Geneva GATT drafting session in the summer of 1947 observed that "of all the vague and woolly punitive provisions that one could make, [nullification and impairment] seems to me to hold the prize. It appears to me that what it says is this: In this wide world of sin there are certain sins which we have not yet discovered and which after long examination we cannot define; but there being such sins, we will provide some sort of punishment for them if we find out what they are and if we find anybody committing them" (Hudec, 1975).
- 5 Post-war trade relations were dominated by the scarcity of convertible currencies that countries (with the notable exception of the United States) experienced as a consequence of wartime disruptions and the costs of reconstruction. Most European countries had extensive systems of exchange and import controls in place until after the Korean War, when the dollar shortage diminished and countries slowly began to dismantle these systems (Gardner, 1956).
- 6 A list of possible non-tariff measures to be considered for negotiation was prepared by the GATT Secretariat from its Non-Tariff Measures Inventory. Some 150 of the 900 measures notified to the Inventory were in the area of standards.
- 7 See *Analysis of United States Negotiations, 1960-61 Tariff Conference*, Department of State publication 7349, p.203 (Evans, 1971).
- 8 Article VI of the GATT had allowed members to impose anti-dumping duties to offset the margin of dumped goods (provided they caused or threatened to cause "material injury" to domestic industry), but there were growing concerns that the ways that anti-dumping procedures were applied (delays, the injury test, calculations of margins, etc.) could serve as a hidden restriction on trade.
- 9 There is evidence, however, that non-tariff measures, such as trade remedy actions and other less conventional measures, increased after the "trade collapse" that followed the 2008 financial crisis (Gregory et al., 2010).