

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG8/W/58

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AGREEMENT ON TECHNICAL BARRIERS TO TRADE
PROCESSES AND PRODUCTION METHODS
Proposal by New Zealand

Introduction

The main area of weakness in an otherwise successful Agreement with good membership is its coverage of processes and production methods (PPMs). Article 14.25, where they are expressly mentioned, has been subject to different interpretations, which have prevented it from working effectively. The understanding reached in 1983 has not helped, and despite the commitment that the Parties made to cooperate in the process of dispute settlement, has not enabled this provision to be effectively workable. It is unlikely that any further attempt to define the circumstances under which 14.25 can be invoked would succeed.

PPMs have essentially the same functions as technical regulations and standards based on product performance or characteristics. They are widely used, and as has been pointed out in another proposal (MTN.GNG/NG8/W/24) are being increasingly used in some areas, especially in high technology goods. PPMs are thus just as liable to create the sort of trade barriers that the Agreement is designed to prevent. New Zealand considers that the opportunity should not be lost to improve and clarify the coverage of PPMs under the Agreement. This will enable it to remain relevant and effective in preventing unnecessary obstacles to trade.

New Zealand sees no major difficulty in applying to PPMs the substantive disciplines of the Agreement. Such principles as transparency, national treatment, use of international standards, already embodied in provisions of the Agreement, are equally appropriate for PPMs. One area where specific PPM-related provisions will be required is the determination of conformity (Article 5). Provision needs to be made for the cooperation of the exporting country in the process of determining conformity, since the testing procedures under Article 5.1 cannot, because of the nature of PPMs, be applied. In order to ensure that a PPM-based regulation or standard is being met, means other than testing are required, such as, for example, the possibility of on-site inspection in the exporting country. There is also a need to establish a principle of equivalency, so as to allow exporting parties to meet the regulation or standard by a PPM which may not be exactly the same. This acknowledges that there may be valid reasons why conditions in the exporting country may not easily allow for a specified PPM to be used, but where a PPM having equivalent effects is available. Acceptance of this principle will help remove a potential source of unjustified trade barriers.

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Outline of the Proposal

The proposal does the following:

1. It incorporates PPMs into the definition of technical specification.
2. It establishes a preference for drafting regulations or standards in terms of product performance or characteristics rather than PPMs. This is because, as is acknowledged in present Article 14.25, PPMs may be used as an obstacle to trade where an alternative non-PPM standard is available. It does not however prejudice the use of PPMs where they are appropriate.
3. It establishes an equivalency principle, and provides for cooperation between the exporting and importing parties in applying it.
4. It deletes Article 14.25, which would no longer be required in view of the rest of the proposal. Any attempt to circumvent obligations under the Agreement by drafting requirements in terms of PPMs rather than product-based standards could no longer achieve the effect of circumvention, because it would be caught by:
 - the inclusion of PPMs per se in the Agreement;
 - the preference established in Article 2.4 not to use them when alternative product-based regulations or standards are available and appropriate.
5. It includes a general definition of PPMs.

Relationship with Other Proposals

1. U.S. Proposal (MTN.GNG/NG8/W/24 and TBT/W/108/Add.1)

New Zealand supports the thrust of this proposal. Our proposal offers an alternative solution, the main differences being:

- the preference for product-based regulations and standards;
- the equivalency principle;
- deletion rather than amendment of Article 14.25;
- a short, rather than a long definition of PPMs.

2. Nordic Proposal on Testing and Inspection Procedures
(MTN.GNG/NG8/W/50)

New Zealand sees this proposal as complementary to the provisions of the present proposal.

New Zealand also supports the Nordic suggestion to amend the term "determination of conformity". This proposal has for the sake of clarity been based on the present wording of the Agreement.

3. Sanitary and Phytosanitary Negotiations

This proposal is without prejudice to the outcome of negotiations in the Agriculture group on sanitary and phytosanitary matters, and is in no way a substitute for comprehensive negotiations there. The proposal is in itself independent, and as indicated above, is designed to ensure a more complete coverage by the Agreement of areas likely to give rise to technical barriers to trade. Insofar as new disciplines to be negotiated in the Agriculture group may be relevant to PPMs, we acknowledge that they would need to be made consistent with what is agreed on PPMs within the TBT Agreement (and vice versa), whether or not they are eventually incorporated in the TBT Agreement. This should not prevent work going ahead on this issue.

Proposed Amendments to the Agreement

1. Annex 1.1

Amend the definition of Technical Specification as follows:

A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements as they apply to a product.

It may also include processes and production methods insofar as they are necessary to achieve the required characteristics of a product.

This definition is intended to make clear that the processes and methods that must be used in the production of a product are covered by the Agreement. The product coverage of the Agreement is defined in existing Article 1.3, which does not require any change.

A separate definition of "process and production method" could also be incorporated in Annex 1, as follows:

Means by which or conditions under which a product advances to its final state.

New Zealand does not believe a definition is absolutely necessary, but acknowledges that several participants favour devising one. While New Zealand has no specific objection to the U.S. definition, our preference is for a broader and simpler overall definition, as there does not appear to be much disagreement over what constitutes a process and production method.

2. Article 2.4

To be amended as follows:

Wherever appropriate, Parties shall specify technical regulations and standards in terms of performance rather than design or descriptive characteristics, or processes and production methods.

This makes PPMs the third element of the hierarchy of types of regulation or standard. By establishing a preference for other types, it will discourage the use of PPMs in an arbitrary way, when another type is available. There may well be cases where a PPM will be more appropriate than another type of standard even when either could be used. It would be up to the party imposing this PPM to explain, on request, why the PPM was appropriate in this case. A typical case would be where suitable testing methods are unavailable or impractical, eg. in food irradiation or pressure vessels.

3. New Article 5.2 BIS

Parties shall ensure that in determining conformity with technical regulations and standards based on processes and production methods, their central government bodies also accept PPMs used in exporting Parties which differ from their own, provided they are satisfied that the PPMs in the exporting Parties provide equivalent guarantees in terms of the objectives of the technical regulations and standards. Parties shall ensure that their central government bodies make every effort to reach agreement on conformity, or equivalency of PPMs, through consultation. To this end, exporting Parties shall make available all relevant information to importing Parties, and shall ensure they have adequate access to facilities they require for the purpose.

This article recognizes that when they do use PPM regulations/standards, in order to minimize the risk of unjustified obstacles to trade, Parties should be prepared to accept PPMs, which while not identical, can be shown to be just as effective in meeting the objectives of the PPM regulation/standard. These objectives of course would be those that are legitimate under the terms of the Agreement.

4. Article 14.25 : Delete

As it would no longer be possible to circumvent the provisions of the Agreement simply by drafting a regulation or standard in terms of a PPM, this specific dispute settlement provision becomes superfluous. PPMs would be subject to the same set of dispute settlement provisions as other regulations and standards.