



Trade Hot Topics

Non-Tariff Measures and the Post-Bali Agenda: Considerations for Commonwealth African Countries

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Introduction

Non-tariff measures (NTMs) are 'policy measures, other than ordinary customs tariffs, that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both'.¹ NTMs represent a broad category of measures that have the potential to distort international trade, irrespective of whether the intent of the measures is protectionist, discriminatory, or whether the NTMs are more trade restrictive than necessary. Non-tariff barriers (NTBs) are a subset of the broader category of NTMs; this subset only includes measures legally characterised as 'barriers'. As tariffs have reduced and the number of NTMs has increased, awareness of NTMs has grown.

This issue of *Commonwealth Trade Hot Topics* will focus only on NTMs as they fall within the non-agricultural market access (NAMA) pillar of the Doha Development Agenda (DDA) negotiations in light of the upcoming WTO 10th Ministerial Conference in Nairobi, Kenya, from 15 to 18 December 2015. It provides an overview of the

scope of NTMs, and offers key considerations for Commonwealth developing countries vis-à-vis NTMs (e.g. in the post-Bali work plan).

Non-tariff measures: scope and purpose

NTMs can be introduced and maintained in order to achieve legitimate public policy objectives – for example, the protection of health, quality assurance, provision of consumer information, etc. In some cases, NTMs mandate performance requirements (e.g. as a technical regulation does in certain cases). The nature of NTMs means that what looks like a purely internal measure could have external effects. The dynamic in trade negotiations on NTMs is different to that which applies when negotiating tariffs. In the first instance it may prove difficult to ask for a 'reduction' of NTMs or the imposition of a less stringent standard because to do so would be to ask a country to reduce the level of protection or contribution to the achievement of a legitimate objective that it seeks to achieve. However, requests for less stringent regulation may succeed where they pertain to legitimacy and proportionality.

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¹ UNCTAD (2013), *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries*, Developing Countries in International Trade Studies, p. 2.

Some NTMs restrict trade, whereas other NTMs may have a neutral or positive effect on trade. Thus, NTMs are not necessarily 'bad' for trade. Moreover, those that restrict trade may be justified. NTMs also affect certain sectors in a more pronounced way – therefore, the composition of the country's export profile can affect the impact of NTMs felt. For example, the agricultural sector is subject to many NTMs and thus countries with large agricultural exports may be relatively more affected by NTMs.

In recent years, a lot of work has been done by a Multi-Agency Support Team (MAST) on NTMs, which is led by the United Nations Conference on Trade and Development (UNCTAD) and had the aim of developing a NTMs classification and methodology (see Table 1). The classification categorises NTMs according to their scope and/or design.

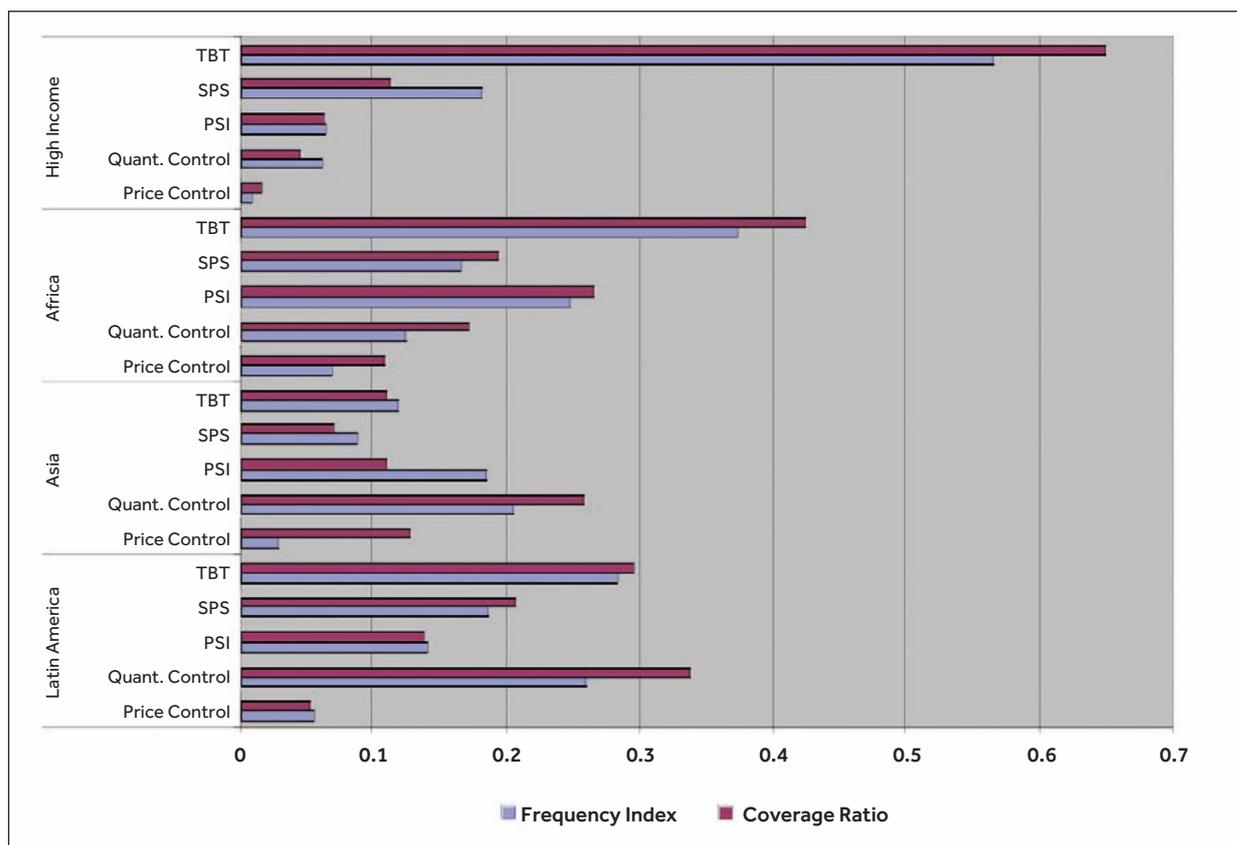
The MAST classification, which was developed for the purpose of data collection and analysis, demonstrates that the concept of NTMs is much broader than the NTMs addressed in the context of the World Trade Organization's (WTO) non-agricultural market access negotiations. For example, intellectual property and trade remedies are not negotiated by the Negotiating Group on Market Access (NGMA).

Table 1: MAST's NTM Classification

	Technical measures	A Sanitary and phytosanitary measures B Technical barriers to trade C Pre-shipment inspection and other formalities
	Imports	Non-technical measures
	Exports	P Export-related measures

MAST is a useful conceptual tool but it does not imply a legal characterisation of measures. The choice of wording by the MAST initiative – that is, non-tariff measures – was deliberate because as explained above not all NTMs constitute non-tariff

Figure 1: Global Distribution of NTMs



Source: UNCTAD Secretariat

barriers. Moreover, MAST only classifies those measures taken by governments. For example, private standards imposed by industry are not classified by MAST whereas non-government action is disciplined to a degree by the TBT Agreement.

Implications of NTMs on international trade in Commonwealth developing countries

A general trend is that small and medium-sized enterprises (SMEs) – the types of firms often found in Commonwealth developing countries – feel NTMs more strongly because of the higher per unit cost of compliance faced by smaller producers. On the other hand, because of the diversity of NTMs, a small firm trading one product with one country may be less affected than a large one with lots of products and markets. Moreover, data suggests that small states²

and developing countries are disproportionately affected by the introduction of NTMs – that is, depending on the type of NTM, its introduction may cause a disproportionate decrease in imports from developing countries (i.e. a greater percentage reduction in imports from developing countries than from developed countries).

Distribution of different NTMs

On average, technical barriers to trade (TBT) measures are imposed on approximately 30 per cent³ of products and trade. Sanitary and phytosanitary (SPS) measures are imposed on approximately 15 per cent of trade. Figure 1 presents an overview of the different types of NTMs across different regions.⁴ Overall, TBT measures are by far the most common type of NTMs imposed by

Table 2: Sectoral Distribution of NTMs

Sector	A: SPS	B87	C: Pre-shipment	D: Price control	E: Quantity control
Live animals	71.3	36.2	21.3	5.7	33.4
Vegetable products	69.2	31.7	24.0	3.6	27.1
Fats and oil	51.1	26.8	12.9	8.0	20.7
Processed food	57.0	41.7	17.7	3.6	20.3
Mineral products	9.8	25.5	8.1	0.6	10.9
Chemical products	11.3	35.8	6.8	1.7	19.6
Rubber and plastics	1.2	24.1	5.7	0.8	6.3
Raw hide and skins	12.8	23.7	9.9	0.0	12.9
Wood	26.2	30.2	12.4	0.8	15.2
Paper	1.7	18.4	8.2	0.6	11.4
Textile	1.8	34.3	15.6	4.7	16.3
Footwear	0.7	38.8	16.7	3.3	17.9
Stone and cement	3.1	19.0	9.7	1.1	6.3
Base metals	1.6	21.0	9.6	1.2	12.2
Machinery and electrical equipment	1.1	20.8	8.2	0.8	13.1
Motor vehicles	0.3	26.2	8.4	0.7	22.5
Optical and medical instruments	0.4	20.0	7.9	0.2	8.1
Miscellaneous good	1.6	23.0	7.2	4.1	7.2

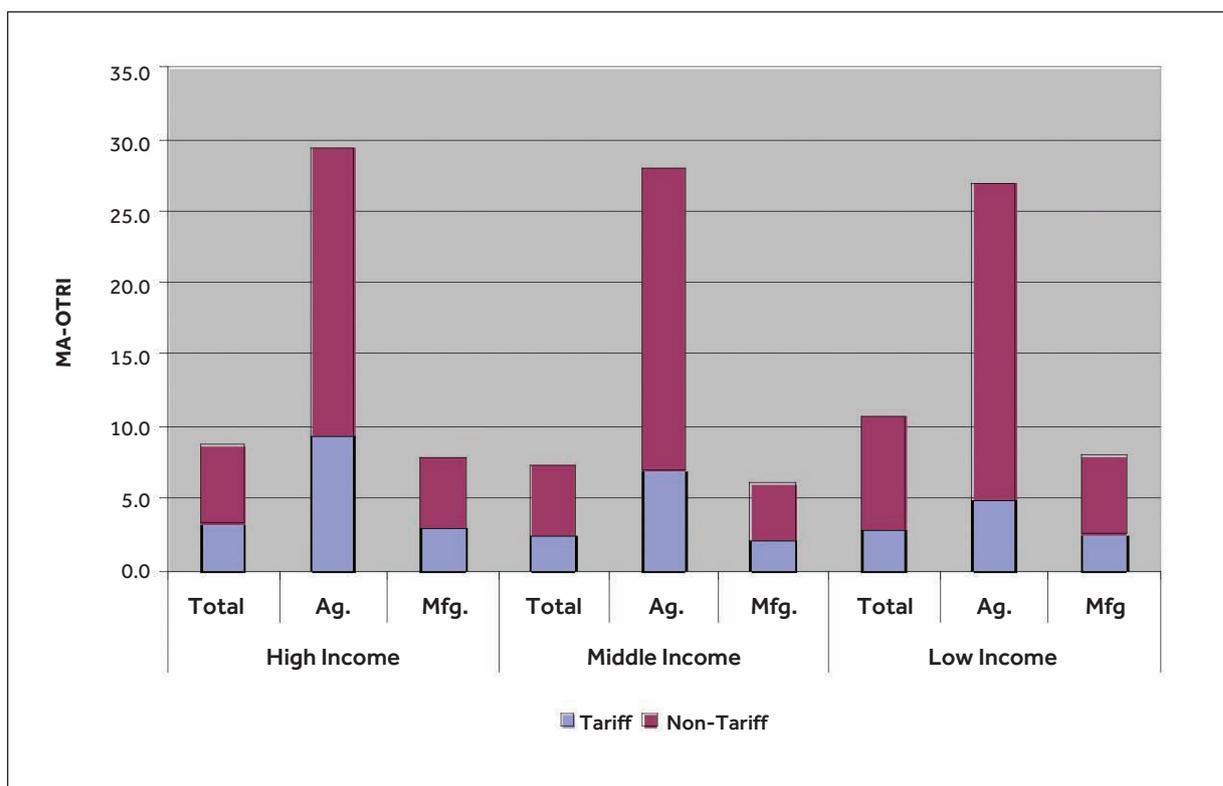
Source: UNCTAD Secretariat

² There are 31 small states in the Commonwealth.

³ UNCTAD (2013), *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries*, *Developing Countries in International Trade Studies*, p. 4.

⁴ *Ibid.*, p. 6.

Figure 2: NTMs Maintained in Export Destinations



Source: UNCTAD Secretariat

countries, followed by SPS measures. Note that Figure 1 suggests, for example, that countries in Africa impose proportionately more TBT and SPS measures than other developing country regions.

Agreements concluded with the European Union, and efforts to harmonise regulations with the EU, may explain the relatively large apparent use of SPS and TBT measures by African countries.

As indicated previously, certain sectors and products are more affected by NTMs when compared with other sectors and products. TBT-type NTMs are more uniformly applied across sectors (with peaks in textiles, footwear, processed food, and chemicals), whereas of course SPS measures are largely limited to agricultural sectors and products of animal origin.

Table 2 illustrates how the incidence of NTMs varies across economic sectors. This variance appears to occur primarily for technical reasons and thus does not change much across countries. Products such as footwear, wood and motor vehicles are subject to NTMs because of consumer and environmental protection and technical standards; whereas other goods (e.g. minerals) are less regulated.

NTMs on exports and imports

Figure 2 demonstrates the importance of NTMs for exports, depending on the income level of the

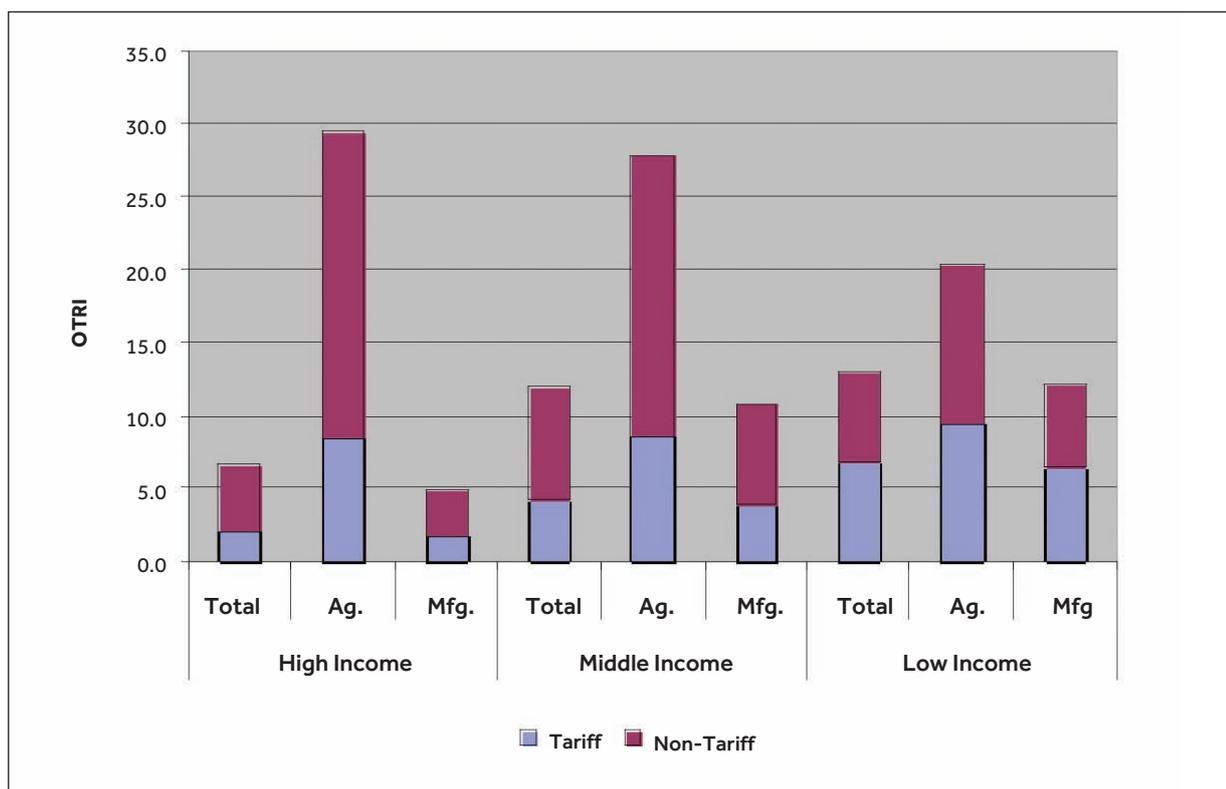
products' *originating country*. It illustrates that the contribution of NTMs to market access 'restrictiveness' is more than double that of tariffs. The information was compiled by the UNCTAD Secretariat on the basis of data gathered by the World Bank for its Market Access – Overall Trade Restrictiveness Index (MA-OTRI).

In some cases – for instance agricultural products from all countries – NTMs are much more important than tariffs. These data only relate to NTMs, and make no distinction between NTMs and their subset of NTBs; the existence of an NTM implies a restriction for the purposes of this exercise (despite the reality mentioned previously that NTMs may facilitate trade).

Figure 3 provides an illustration of the importance of NTMs for imports, *depending on the income level of destination market* (i.e. where the products are being imported into).

The graph confirms that NTMs' contribution to overall trade 'restrictiveness' for imports is generally much higher than the contribution of tariffs. NTMs substantially add to the level of restrictiveness of the agricultural sector – when compared to the manufacturing sector – especially in high and middle income countries, whereas in low income countries restrictiveness is more evenly a result of tariffs and NTMs.

Figure 3: NTMs Imposed on Imports



Source: UNCTAD Secretariat

NTMs are *relatively* more important for imports to high and middle income countries. This can be explained, *at least in part*, by the *relatively* higher reliance of low income countries' trade policies on tariffs.

Impact of NTMs on trade

Policy-makers and trade analysts have found that estimating the effects of NTMs is a complex task, particularly the effects of technical measures (such as TBT and SPS measures), which can have diverse effects depending on their particular type, scope and administration mechanisms.

It should be recalled at the outset that NTMs such as standards and technical regulations have been shown to have trade- and demand-enhancing effects as well as restrictive effects.⁵ The specific nature of the NTM may determine whether the effect is positive or negative – for example, labelling schemes may increase profits whereas duplicative conformity assessment procedures (CAPs) may cause diseconomies of scale and scope.⁶

On the basis of studies undertaken,⁷ the following can be garnered with respect to the effects of NTMs:

- SPS and TBT measures often increase fixed and marginal trade costs and/or production costs and give rise to trade distortion.
- Compliance costs may be different for countries depending on their technology, infrastructure and geography. Firms in developing countries are generally less able to adapt quickly to regulations; SMEs generally find it much more difficult to comply.
- UNCTAD (2013) recalls *inter alia* some case studies involving African, Malaysian and Chinese exports that offer more nuanced detail on the benefits and otherwise of NTMs for trade volumes (depending on whether they apply to the agricultural or industrial sector, etc.); NTMs can also lead to reduced import volumes from particular countries, for example, beef exports from *inter alia* South Africa.
- NTMs can apply on a country-specific basis. The

⁵ UNCTAD Brochure on the UNCTAD Programme on Non-Tariff Measures in World Trade; UNCTAD (2013), *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries*, *Developing Countries in International Trade Studies*, p. 19.

⁶ *Ibid.*, p. 32.

⁷ See UNCTAD (2013), *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries*, *Developing Countries in International Trade Studies*, which in turn references many other studies. See also ICTSD, Bridges Africa, 'How do NTMs constrain the effectiveness of India's preferential scheme for LDCs?', 4 March 2015, <http://www.ictsd.org/bridges-news/bridges-africa/news/how-do-ntms-constrain-the-effectiveness-of-india's-preferential>.

cost, complexity and length of conformity assessment procedures (CAPs) may depend on the origin of the product in question.

- The complex, and sometimes unjustifiable, application of regulations and CAPs may lead to the perception by developing countries that NTMs create unjustifiable market access restrictions.
- Regulations not based on international standards are more restrictive and damaging, for example for exports from developing countries.
- Bilateral and regional harmonisation may lead to trade diversion and decreased export variety⁸ (with more pronounced effects for low income country exports).
- NTMs can impact domestic industrial policy objectives, parts of the domestic supply chain and domestic consumers in the country maintaining the NTMs. Thus domestic regulatory improvements may provide the necessary encouragement for reform of NTMs, rather than trade negotiations.
- NTMs may impact developing countries' ability to take advantage of tariff preferences and MFN (most favoured nation) tariff reductions.

Case study - specific observations on African trade and NTMs

Commonwealth African countries' exports are subject to NTMs applied by governments in the relevant export markets and NTMs applied by their home governments. Similarly, Commonwealth African countries apply NTMs on imports into their territories, which are likely also impacted by NTMs applied in their country of origin. This is true in respect of intra-regional trade as well as trade with partners outside the region. Applicable NTMs vary depending on the origin and destination of the particular product.

A series of private sector surveys⁹ – conducted by the International Trade Centre (ITC) – in which companies are asked about the non-tariff barriers

that they encounter domestically and abroad have highlighted several observations:

- While TBT and SPS measures are the most prominently applied NTMs, surveys suggest that intra-African trade may face a very different make-up of NTMs.
- For African exporters, implementation issues are reportedly the most significant source of concern.
- Countries with the highest average *ad valorem* equivalents for NTMs are all low-income African countries, including *inter alia* Nigeria and the United Republic of Tanzania¹⁰
- Rwandan exporters surveyed by the ITC reported encountering more NTMs applied by destination and transit countries than applied by Rwanda and reported CAPs as by far the most significant NTB to exports (representing 60 per cent of total NTMs reportedly encountered).
- NTMs on vegetable oils and fats increased their prices in South Africa by 90 per cent.
- SPS and TBT measures can have a different impact on exporters depending on their size, as illustrated in an example where African exporters experienced an *overall* negative impact further to measures adopted by the USA, the EU, Japan, Canada, Australia and Switzerland, whereas exporters in other developing countries did not.¹¹
- An EU move from an international standard for maximum residual levels (MRLs) of pesticides to a more stringent EU standard reportedly resulted in a decrease (US\$670 million) of African exports of cereals, dried fruits, and nuts to the EU.
- NTM-related costs increased the average cost of living in Kenya by about 8 per cent, with a more pronounced impact on poorer Kenyans.¹²

To date, more specific trade concerns (STCs)¹³ have been raised by Commonwealth African countries in respect of NTMs maintained by other

⁸ UNCTAD Brochure on the UNCTAD Programme on Non-Tariff Measures in World Trade; UNCTAD (2013), *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries*, Developing Countries in International Trade Studies, p. 30 and 32.

⁹ To date, the following Commonwealth African countries have been surveyed as part of this ITC programme: Kenya, Malawi, Mauritius, Rwanda, and Tanzania. Uganda's survey commenced in August 2015, with results yet to be disclosed.

¹⁰ WTO (2012), *World Trade Report 2012 – Trade and public policies: A closer look at non-tariff measures in the 21st century*, p. 138.

¹¹ Ibid.

¹² UNCTAD (2015), *Deep Regional Integration and Non-Tariff Measures: A Methodology for Data Analysis*, p. iii and 21.

¹³ STCs are raised in TBT or SPS committee meetings and correspond to concerns about TBT/SPS measures maintained by one or more WTO members affecting one or more products.

countries than vice versa. STCs raised by Commonwealth African countries have concerned NTMs maintained by countries outside the region. These STCs have related to various sectors/types of measures (e.g. tobacco, alcohol, asbestos, foodstuffs, beef, horticultural products, chemicals, and environmental regulations).

The STCs have pertained to various issues, including labelling, concerns over unnecessary trade restrictions, transparency, etc. Notably, many STCs have been raised in recent times with respect to plain packaging measures and proposals being adopted in different jurisdictions. Although South Africa is by far the most active of these countries in raising STCs, other countries that have raised STCs include Zambia, Nigeria, Malawi, Botswana, Mauritius, Kenya, Mozambique, Uganda and Tanzania.

STCs raised vis-à-vis measures maintained by Commonwealth African countries have only concerned measures maintained by Kenya and South Africa, and have been raised by the EU and the USA for the most part (and Mexico in one instance). These STCs have covered three sectors (textiles, alcohol and foodstuffs) and have concerned various issues, including transparency, labelling, etc.

NTM (NAMA–NTB) negotiations at the WTO: status

Between at least 2008 and 2011, the focus of the Negotiating Group on Market Access was on 'NTBs'. An account of the then work in progress on 'NTBs' as of April 2011 was set out in the *Textual Report by the Chairman, Ambassador Luzius Wasescha, on the State of Play of the NAMA Negotiations*. The then Chairman of the NGMA was optimistic when compiling this report; he considered that 'there [was] a significant potential NTB-package within reach'.

However, it is no secret that serious challenges have stalled DDA negotiations since 2011. Issues other than NTMs have caused these frustrations – for example, the failure to agree on NAMA/industrial tariff reductions in 2011.

The WTO membership agreed July 2015 as the deadline for a 'clearly defined work programme on the remaining Doha Development Agenda issues'. Discussions on relevant issues were held before the deadline expired but in the end no real progress

on reaching actual agreement with respect to a work programme was achieved. By the time a meeting of Heads of Delegations was held on 17 June 2015, WTO Director-General Roberto Azevêdo noted that 'no progress on the gateway issues' had been made as of that date. This was a rather stark assessment of negotiations but turned out to be true. Now the focus has changed and it is on Nairobi. Ambassador Azevêdo has asked that members respond to the wake-up call that was the missed July deadline and to focus on achieving outcomes at the WTO's Ministerial Conference in Nairobi in December.

Both the ACP (African, Caribbean and Pacific) Group and the current Chair of the NGMA have made recent efforts to have NTMs put higher on the agenda of NAMA negotiations. In a March 2015 *Submission from Barbados on behalf of the ACP Group of States: ACP Elements for Defining a Post-Bali Work Program on Remaining Doha Development Agenda Negotiations*, the ACP Group called for a potential NTB package to be agreed, recalled the language of paragraph 16 of the Doha Ministerial Declaration by emphasising the interests of developing countries, and called for a package that would at least address these needs and interests:

Non-tariff barriers (NTBs) should be an integral part of the negotiations and should focus on reducing NTBs that affect particularly products of export interest to developing countries.

Members shall aim to reach an agreement by the 10th Ministerial Conference on a potential NTB-package structured around, at minimum proposals identified by ACP, other developing countries and LDCs concerning different types of NTBs impacting their NAMA trade.¹⁴

In his Oral Report of 27 April 2015, the Chair of the NGMA reported on efforts to raise NTBs in informal meetings with members but indicated that his efforts were faced by a lack of engagement by members on NTBs. Moreover, the NGMA Chair also reported 'a more genuine effort' by members to explore avenues to move forward on NAMA but that a lack of progress in agriculture was hampering progress. Although the NGMA Chair perceived that members were making some efforts to explore ways to move forward NAMA negotiations, there were at least some members that did not appear to view NTBs as a priority at present.

¹⁴ JOB/TNC/46 of 12 March 2015, paras. 3.2 – 3.4, (emphasis added).

Considerations for Commonwealth developing countries

In this regard, considerations are not limited to export interests; when considering how to proceed, Commonwealth developing countries should consider their offensive as well as defensive interests because any commitments ultimately agreed will apply to, and between, all WTO members. In this regard, the interests of all Commonwealth developing countries in proposals on the table may not necessarily be the same.¹⁵

Commonwealth developing countries may wish to take account of the following:

- What has and has not been achieved in recent years in the internal WTO bodies, for instance the TBT Committee. For example, principles on good regulatory practice have been developed although the Committee has not adopted them because of concerns over the legal effect of adopting them in light of the Appellate Body's ruling in *US – Tuna II (Mexico)* that a decision of the TBT Committee is a subsequent agreement within the meaning of the Vienna Convention on the Law of Treaties.
- Recent relevant rulings of the Appellate Body. For example in *US – Tuna II (Mexico)*: its finding relevant to the delineation of standards and technical regulations. Also, the Appellate Body's finding on the status of TBT Committee decisions. For example in *US – Clove Cigarettes*: on TBT Article 2.12, which gave definitional content to the reasonable interval to be extended to developing countries between the publication of technical regulations and their entry into force.
- What has happened and is happening in the sphere of preferential trade agreements. Developments with respect to 'regulatory convergence' in the context of preferential trade

agreements should be given close attention.

- Consideration could also be extended to what Commonwealth developing countries have achieved in agreements and regimes to which they are party – that is, regional integration agreements and preferential agreements with trading partners outside the region.

Conclusion

NTMs can be trade restricting or trade enhancing, depending on the particular measure. The elimination or reduction of NTMs is in most cases not a viable goal in light of the fact that NTMs are introduced for legitimate policy purposes in the majority of cases. However, NTMs can pose challenges for developing country exports (including the ability to make use of tariff preferences extended to their products).

Compliance costs, implementation and associated procedures pose particular challenges for developing countries. The proposals that already have most support at the WTO may go some way to overcome these challenges (e.g. proposals for increased convergence with international standards, enhanced transparency, and for a 'horizontal mechanism' for the resolution of concerns).

The focus of the DDA negotiations has not been on NTMs in recent years. However, recent efforts to give a more central place to this area may be welcomed, not least because there are proposals for which consensus is conceivable. The absence of a *quid pro quo* dynamic in the NTMs context is a factor that could facilitate an early agreement on a NTMs package. Moreover, in light of the relative importance of NTMs for developing country trade, an argument could be made that an 'early harvest' on NTMs – and its delinking from other issues such as tariff liberalisation – would be consistent with the original development mandate of this round of WTO negotiations.

¹⁵ For example, Commonwealth African countries appear to be net importers of autos; however, Nigeria and Uganda manufacture and export autos and it has been reported that there may be growth in this industry for these countries.