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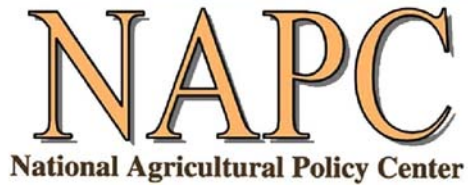
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Ministry of Agriculture and Agrarian Reform



POLICY BRIEF No 32

Initial Negotiating Rights (INRs) in the WTO

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1. Abstract

Initial Negotiating Rights is a useful tool to find a compromise in the WTO bilateral negotiations, particularly in the accession stage. This policy brief sheds light on the provisions of INRs in the WTO. It also elaborates a number of case studies, and draws some recommendations. Particularly, the paper focuses on the INRs and small and medium –sized countries, and the reasons which pushed these countries to confer INRs.

2. Introduction

The WTO is still the unique organization that possesses the capability of organizing and promoting multilateral trade, despite all the stumbles and decelerations it has been suffering from. Consequently, WTO membership has special importance in the national trading system for each country in the world. Accordingly, while 153 countries have joined the WTO, the rest are trying to join, or working to finish the accession process. Moreover, when a country wants to join the organization, it submits an application. After approving the application, and formulating a working party, the applicant country presents its primary offers¹. Member countries declare their positions towards tables of primary offers by introducing specific list comprising their requests to the applicant country. These requests are to be reviewed and examined by the applicant country, in order to decide whether they are (or most of them) applicable or not. The requests mostly contain the following items²:

1. Reducing tariff bounds on agricultural and manufactured commodities to a level that doesn't overpass the timely applied one. In this context, commodities of special importance for member countries need special attention; member countries mostly seek zeroing tariffs of these commodities as a basic position in negotiations.
2. An obligation that tariff reduction will cover all agricultural and manufactured commodities with no exception. This means that all tariff lines will be bounds. In addition, joining sectoral initiatives once the accession is materialized (and not gradually, as usually mentioned in the primary offers of the applicant country) should be cleared.
3. Enacting necessary laws and executive instruction. Economic activities that would not be covered by this obligation have to be stated, accompanied with their interpretational reasons. Furthermore, a timetable that includes specific dates to abolish these exemptions should be presented as well.
4. An obligation to liberalize services sector as much as possible. Market access barriers should be reduced, and market access conditions should be facilitated. Additionally, foreign services provider should be treated as national ones, without discrimination as long as possible. In this way, the applicant country matches what it is calling for with its obligation to liberalize trade and to open markets in order to attract foreign investments. In addition, it is necessary to introduce clear and reasonable explanations for blocking (not liberalizing) some services sectors, or limiting some available economic activities.
5. Attributing initial negotiating rights (INRs) on a number of agricultural and manufactured commodities to member countries which consider these commodities of special importance for them, in accordance to article XXVIII of the GATT.

3. INRs definition

INRs are rights that have been negotiated with a WTO member. INRs relate to tariff concession for given products. Moreover, they may be offered by current WTO member, or country that will

¹ For detailed information about the primary offers, please refer to the special issue of Syrian Agricultural Trade (SAT) report (NAPC, 2004).

² Based on the electronic "Al Ektisadyah" newspaper.

be a WTO member. And negotiating INRs can be in place either in the context of multilateral negotiations or in the context of accession's negotiations. An INR allows for seeking compensation if the attributer country modified or abolished the INR (which is in this case a bound tariff rate). INRs are to be registered in national concessions' tables, and attributed to countries that have been previously negotiated with, for that purpose.

There are detailed clarifications about methods in which WTO members can modify or withdraw a registered concession in their national tables in article XXVIII of the GATT 1994. Article XXVIII identifies time periods for notifications. It also specifies required contents. Indeed, for a given member country, to modify a concession or to withdraw it, the country has to negotiate and agree with other member countries which it has negotiated them about this concession (INR) in the past, as well as with members having principal supplying interest. The concerned country should also negotiate the issue with countries having substantial interest. In this context, to have a substantial interest in a commodity trade, is to possess a substantial share of that trade in the markets of the country tending to offer the concession. In fact, there is no accurate definition of "substantial share", though 10% are generally considered substantial.

Principal supplying interest is attributed usually to countries that have the largest share of exports of a given commodity in the market of that country tending to modify its current tariff. During Uruguay Round negotiations, member countries negotiated multilaterally linear tariff cuts. Nevertheless, INRs are not applicable for such reductions, since they are conducted only on individual tariff lines. Yet, WTO members created the concept of "floating INRs" and attributed it to countries having principal supplying interests. The process is described "floating" because INRs are still "rights" theoretically till the concerned commodity is bilaterally renegotiated.

WTO agreements state that "The INRs resulting from request-offer procedures between Members shall be registered in the Schedules on a tariff line basis, with a clear indication of the countries involved in the concession and the level of INR at bilateral level." and "A review clause shall apply to historical INRs as well as to INRs resulting from the present negotiations. This clause will allow Members to adapt the final bound rates on a periodical basis, with a view to preserving the economic value of the INRs in question."

Source: WTO documents (TN/AG/6)

4. Historical and legal review

In the early years of GATT, each concession offered by a GATT member was linked to one party (or more) contracted on an INR. Moreover, when a subsequent negotiation about a concession on the product which an INR was previously conferred on it took place, the old contracted party was treated either like the new contracted party or not; the criteria was the change in its market share. Consequently, in negotiations, a given product could have several levels of INRs, utilized by one party or more. Old INRs that didn't result from the latest negotiations were called "Historical INRs". In addition, INRs were used as a reward in bilateral negotiations, either in the context of reciprocal significant concessions or as an additional issue for topping up balance.

The Uruguay Round Understanding on the interpretation of article XXVIII presented new concept about INRs. That is "when a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' statistics are not available), a member having initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question."

Article XXVIII gives the right to determine whether a member has substantial interest, or principal supplying interest in a given commodity, to the ministerial conference. The interpretative notes of the article states that a member country would be deemed to have substantial interest or principal supplying interest if it has (or had) for a reasonable period

before the negotiations a larger market share than another country that negotiated previously for an INR. Alternatively, if this larger share could be obtained in case quantitative discrimination applied in the importer country were abolished, the country is also to be deemed having substantial interest or principal supplying interest. Furthermore, according to the interpretative note, there is usually no more than one country to have this position in every case, or at most two countries in some exceptional situations, where the two concerned countries have equal shares of exports. Another interpretative note defines additional category of members having principal supplying interest. In fact, Uruguay Round Understanding on the interpretation of article XXVIII provides that “where the concession to be modified affects a major part of the total exports of a country,” the country is to be considered having principal supplying interest.

Moreover, Uruguay Round clarified a couple of important points in regards to having principal supplying interest or substantial interest:

- First, when principal supplying interests or substantial interests are examined, only trade under “Most Favored Nation” (MFN) is to be considered. Trade flows that are not under MFN (as these under the Generalized System of Preferences (GSP)) would be considered only if the country withdrew the preferential system when tariffs were renegotiated, or it will withdraw it before finalizing the negotiations.
- Second, the agreement clarifies the issue of the new product that “three years’ trade statistics” are not available for it, as mentioned in this paper.

Concerning the agreement, it is noticeable that there is no specific criterion to determine the “substantial interest”. The interpretative notes state clearly that the issue is capable of preciser definition, although they introduce general indicator for the principal supplying interest. Furthermore, as mentioned above, the article requires the member tending to withdraw or modify its concession to negotiate the issue with members having INRs or principal supplying interests till an agreement is at hand. Nevertheless, the article asks for only negotiating those having substantial interests; the later have only the right to be consulted.

Paragraph 1 of article XXVIII states that on the first day of each three-year period (regarding this paper, last three-year period ended in 31-12-2008) any member can modify or withdraw a concession after negotiating members having INRs or principal supplying interest, and after consulting those having substantial interests.

Furthermore, two additional situations allow for launching such negotiations without sticking to specific date:

- When special circumstances come up, the ministerial council can authorize negotiating an INR
- Also renegotiating an INR can be started at anytime (without waiting for the next three-year period) when a party decide to reserve the INR before the beginning of implementation period.

In case that the concerned country is waiting for the next three-year period, the notification for the planed action should be submitted within three months after the first day of the three-years period, but it also shouldn't be submitted earlier than six months of that day. Usually, notifications are submitted between 1 July and 30 September, and the negotiations are finalized before the end of the year. So the agreement goes into force with the beginning of the new year. Nevertheless, in the case of special circumstances, there are stricter deadlines: the decision about the request to renegotiate the INR should be taken within two months after submitting it. Also the negotiations concerning the concession should be completed in two months. However, a longer period may be allowed if there are a larger number of issues to be discussed. Moreover, if a deal couldn't be struck during this period, the country has the right to withdraw the request and report to the ministerial council to re-examine the issue and take the proper recommendations.

Furthermore, in negotiations where the applicant country fails unreasonably to offer adequate compensation, any decision regarding this should be taken within a month of submitting the matter. Yet, regarding the last case (reserving INRs), there is no specific time for starting or finalizing the negotiations.

Equally important, when an INR is renegotiated, “a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that provided for in this Agreement prior to such negotiations” should be maintained (8/XXVIII). For example, the Uruguay Round Interpretative Understanding states that unlimited tariff concession should be replaced by a tariff rate quota. Paragraph 6 of the Understanding includes that, “When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

- the average annual trade in the most recent representative three-year period, increased by the average annual growth rate of imports in that same period, or by 10%, whichever is the greater; or
- trade in the most recent year increased by 10%.

In no case shall a Member's liability for compensation exceed that which would be entailed by complete withdrawal of the concession.”

4.1. Withdrawing a concession without an agreement with INRs holders

Article XXVIII provides that the right of a member to modify or withdraw a concession is absolute, but related procedures should be also taken into consideration. This right is independent from an agreement with INRs holders, or with those having principal supplying interests. Nevertheless, the member who conducts the modification or withdrawal will be subject to reciprocal and substantial withdrawals or modifications if it didn't agree previously with these countries. This right is reserved for INRs holders and countries having principal supplying interests if an agreement was not reached with them, or if those having principal supplying interests were not satisfied with that agreement. Moreover, the retaliating withdrawal should be enforced by INRs holders and countries having principal supplying interests within six months after the basic withdrawal or modification, and a transitional period of 30 days should be permitted after notifying the concerned country.

4.2. Legal situation of a country after withdrawing or modifying an INR

According to an interpretative note to article XXVIII, when a country withdraw or modify an INR, its legal obligation will change. The point is not the real change to its applied tariff, because the country can postpone applying the new tariff in shed of its new commitments, but the point is about the legal position of the given country. In this sense, the country which agrees with INRs holders to postpone changing the tariff can also agree to postpone the compensating concession.

5. INRs and small and medium-sized countries

The Understanding on the Interpretation of Article XXVIII of the GATT 1994 states that a WTO member country can be deemed to have principal supplying interest if its trade in the given commodity represents substantial portion of the country's exports. However, the Understanding states that its first chapter will be reviewed after 5 years of ratification in order to ensure that “this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favor of small and medium-sized -sized exporting members.”

The Committee on Market Access indicates in 12-10-2000 that it reviewed the first chapter, in accordance to the instruction from the Council for Trade in Goods. The committee didn't find a

need to change the criterion of attributing INRs to a WTO member. Yet, the committee confirmed the right of any member to re-raise this issue again, and re-evaluate its advantages.

Later on, during the Special Session on Implementation of the General Council in 15-12-2000, there was recalling reallocating INRs in favor of small and medium-sized exporting countries. In this sense, the African group circulated a proposal in 17-7-2002 that seeks urgent review of the Article XXVIII in order to re-balance the relative rights of small and medium-sized exporting Members. Accordingly, the proposal was discussed by the Committee on Trade and Development during its meetings in 21-11-2002 and 25-11-2002. Nevertheless, the committee rejected the proposal, asking for more clarification about the meaning of “re-balancing”, and how could it be achieved. And up to date, the initiative has not been re-followed-up again.

6. INRs and WTO accession

INRs is being used as a useful tactical tool in bilateral negotiations about tariff, which take place after submitting the application to the WTO secretariat. Noticeably, INRs are dominated by major players in the WTO, i.e. Canada, Australia, the EU, the US, Japan and New Zealand. And to a lesser extent, they are also dominated by India and Brazil. In addition, INRs are conferred repeatedly and at all times to some other WTO members. In this sense, and considering this situation, the bilateral negotiations about tariff will inevitably involve many parties. This would make it difficult to reach an agreement through this “bilateral-turned plurilateral” negotiation.

According to WTO documents, recent acceded countries (particularly small countries) mostly conferred considerable INRs to other WTO members. For example, Moldova attributed INRs on about 80% of its tariff lines evenly and equally among major players in the WTO. The only exception was the EU, which is theoretically the first trading partner of Moldova. Surprisingly, Moldova conferred the EU very few INRs. Georgia, in turn, registered limited number of INRs in its table of concessions. These concessions were dominated by Canada, the US and Australia, in addition to four of five other WTO members. On the contrary, Armenia registered INRs for fewer tariff lines, with more concentration for these major player countries mentioned above. Poland is a current country on Armenia’s table of concessions, as the only European country that was conferred INRs. These INRs are attributed now to the EU after Poland joined the EU. It is worth to mention that Armenia conferred INRs for 3 countries at most on each individual commodity (tariff line). In regard of Kyrgyzstan, its table of concession reveals a high rate of INRs, where the largest share of them are attributed to the EU, followed by the US and Japan respectively. For most tariff lines that Kyrgyzstan conferred INRs on them, INRs were attributed to these three countries. Lastly, Taipei conferred fewer INRs to other WTO members, and distributed them equally and evenly among major developed countries. And for some tariff lines, INRs holders reach to five or six countries per individual tariff line.

On the other hand, almost all major countries in the WTO didn’t attribute INRs to any member country. That is, the EU and the US tables of concessions include no INRs at all. While Australia and Brazil conferred less than five concessions per each. China, however, attributed INRs to a number of countries; 17 countries for some tariff lines, and 7-10 for some others.

7. Case studies

7.1 Chinese experience

China offered India substantial concessions in the process of its WTO accession. India previously offered China considerable concessions in 1998. India’s old concessions covered 120 tariff lines, which represent 80% of India’s exports to China. Reciprocally, China offered India INRs on commodities that are of substantial importance for Indian trade. These INRs stipulates negotiating India and compensating it if china, after acceding the WTO, wants to rise these tariffs above the agreed bounds.

7.2 Georgia experience

Georgia is a WTO member since 1999. Consequently, it has been using its membership to gain INRs from applicant countries, including major countries like Russia. In this context, Russia Federation conferred Georgia INRs on agreed commodities that are mainly Georgian exports to Russia. Georgia also was conferred INRs by Ukraine before its accession to the WTO. The Protocol says, "Taking into account possibility of change of Free Trade regime, the Ukraine granted Georgia Initial Negotiating Rights, on the commodity nomenclature, which is exported from Georgia to Ukraine." Therefore, if Ukraine wants to change these tariffs, it must agree with Georgia in advance. Concerning Kazakhstan, and in the context of its negotiations' accession, Georgia asked it to abolish the list of exemptions and grant Georgia INRs on it as a prerequisite.

7.3 Saudi Arabia experience

Saudi Arabia experience is of great importance, because it is the only Arab country which faced INRs requests. Indeed, Saudi Arabia faced several requests from a number of countries to confer INRs on a group of commodities. In this regard, Saudi Arabia conducted a special strategy; that is to avoid conferring INRs as much as possible. Guided by this strategy, Saudi Arabia negotiated countries that asked for INRs. Agreements were achieved easily with all those countries, except the US. The US asked Saudi Arabia to confer it INRs on 2500 industrial tariff lines (including plurilateral agreements of IT, civil aircrafts, chemical harmonization, papers, and pharmaceutical materials) among 5895 industrial tariff lines. Nonetheless, at the end, Saudi Arabia accepted conferring INRs on 2817 agricultural and industrial tariff lines among 7556 tariff lines, as a mutually acknowledged compromise.

8. Conclusion

As has been cleared above, some countries frequently ask applicant countries for INRs, and bilateral negotiations determine whether to accept attributing these INRs or not. However, country that confers an INR is obliged to respect specific tariff bounds. These bounds can't be risen unless the issue is negotiated with major exporter countries of the product in question, and countries that asked for INRS on these products during the negotiations and gained it. Therefore, it is useful for the negotiating team to apply a well established plan that reserves conferring INRs as much as possible. It is also recommended to negotiate all documents as one interrelated package, conducting a skilful strategy. This would prevent, or at least reduce, impacts of pressures zeroed in on issue of INRs.

On the other hand, the applicant country can invest successfully the issue of INRs in the context of accession's negotiations. That is, when a country shows its strong interest in achieving concession on a given commodity, and if the applicant country deems that the entire concession is difficult to be offered, conferring INRs would facilitate dramatically achieving satisfactory and quick results through negotiations.

All to be considered, it is preferably to use INRs issue as an important card that shouldn't be put on the table unless it's necessary. Also it should be used at the proper time and in a win-win way, so to facilitate accession process and accelerate it.

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