

MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

Resolution of NTBs through a Facilitative Mechanism

Submission by NAMA 11 Group Of Developing Countries¹

Addendum

The following communication, dated 5 May 2006, is being circulated at the request of the delegations of Argentina, Bolivarian Republic of Venezuela, Brazil, Egypt, India, Indonesia, Namibia, Philippines, South Africa and Tunisia.

1. The NAMA 11 Group of Developing Countries, in making the following proposal, recognize that other Members have also been discussing and proposing establishment of “horizontal mechanisms” in the WTO for the timely and cost effective resolution of non-tariff barriers in the NAMA negotiations. For further progress in the direction of finalization of the negotiating draft we look forward to cooperation with all interested Members.

1. Background

2. Non-Tariff Barriers (NTBs) are evolving as an area of serious concern for the WTO Membership. The term ‘Non-Tariff Barriers’ (NTBs) has not been defined under the WTO, but its usage and understanding broadly refers to any border measure other than a tariff, which acts as a barrier on trade. This includes internal measures that, despite in several instances being in line with WTO rules and serving legitimate policy objectives, may discriminate or unnecessarily restrict access to markets, translating into additional costs for the exporters or the importers. Additionally, the benefits sought to be achieved from the reduction of tariffs in the present Round may be negated as a result of the various non-tariff measures imposed by Members, especially against developing countries. Several WTO Members have notified NTBs faced by them in the markets of other Members and have also suggested mechanisms for addressing them².

3. Outside negotiations for the reduction and elimination of NTBs as part of multilateral trade negotiations, at present there are two broad mechanisms for dealing with NTBs – the Committees under each WTO Agreement which oversee the implementation of Members’ obligations under the relevant Agreement, and the Understanding on Rules and Procedures Governing the Settlement of Disputes, (commonly referred to as the Dispute Settlement Understanding or DSU), which provides for resolution of trade disputes. Both of these have been advocated by Members as possible ways in

¹Argentina, Bolivarian Republic of Venezuela, Brazil, Egypt, India, Indonesia, Namibia, Philippines, South Africa and Tunisia.

² See for example, TN/MA/W/25 and TN/MA/W/46 series of documents.

which NTBs could be addressed under the WTO. However, these mechanisms have several limitations.

4. The Committee system operates primarily on the principle of 'notifications' of NTBs. This practice, while playing a role as an 'early warning system', does not provide an efficient mechanism for resolving problems arising from the NTB. The dispute settlement process under the DSU has several inherent limitations that undermine early resolution of NTBs. While it should be recognized that the WTO's DSU is a distinct improvement over the erstwhile GATT procedures due to its predictability and enforceability, as well as being one of the most efficient mechanisms available under international legal regimes, the DSU, which works on the principles of an adversarial process, is expensive, and the time of up to 2 years taken for an enforceable decision, often frustrates the exporter's need for a timely solution.

5. Exporters facing NTBs need real time solutions. A solution that comes 2 years after the identification of the problem does very little to assist exporters in clearing their goods at the port of entry and only adds to costs and leads to a loss of market opportunity. The lengthy dispute settlement mechanism can also create considerable instability especially for a new enterprise in the exporting country. For developing countries, in particular, the dispute settlement process is very costly.

2. NTB Resolution Mechanism

6. The need therefore is for a new, standing, flexible and expedient mechanism that is *solution based* rather than *rights based*; that would offer creative and pragmatic results, which further trade, rather than adversarial outcomes which hinder trade, at least in the short term. Accordingly, a "NTB Resolution Mechanism" is proposed to be established in the WTO as an outcome of this Round. This mechanism will supplement the presently available means to resolve NTBs in the WTO system even after the present Doha Round negotiations conclude. The "NTB Resolution Mechanism" would consider NTBs that affect trade in goods and the Agreements listed in Annex 1 of the Marrakesh Agreement Establishing the World Trade Organization

7. The "NTB Resolution Mechanism" would be guided by the principle of "good faith" and conciliatory negotiations wherein every Member would make a concerted effort to resolve the NTB at hand, under the guidance of a mutually agreed "facilitator". Members would be required to engage with the intention of arriving at a solution to the NTB. It would be informal, low-key and less adversarial than the DSU, and without prejudice to the rights of Members under the DSU. The basic characteristics of such a Mechanism would be:

(a) Finding Pragmatic Solutions to Trade Effects

8. The fundamental premise for the "NTB Resolution Mechanism" is that there are many NTBs and related issues that can be resolved by trade experts on a case-by-case basis, without going into the legality of the measure. Such a Mechanism will consider primarily the adverse trade impact of such NTB, and not necessarily its legality, and attempt to resolve it on a mediatory or facilitative platform.

(b) Using Expert Facilitators to find the 'Solution'

9. Since most NTBs pertain to specialized areas in trade such as SPS, TBT, customs valuation, etc., any resolution of a problem in these technical areas would also require specialized knowledge on part of the "facilitator". The "facilitator" would thus be an expert in one or more of the concerned fields. For the early appointment of a "facilitator" relevant bodies/committees of the WTO would maintain a roster of relevant experts. The roster would be prepared by Members in the concerned committees through consensus, ensuring adequate representation of experts from developing country Members. Members to the process could select any of the "facilitators" on the roster or any other

person, by mutual consent. In the absence of a consensus, the DG would be empowered to appoint a “facilitator” from among the roster of experts.

(c) Submitting an NTB to the Resolution Mechanism

10. Any Member may submit an issue adversely affecting its trade, and identified by it to be a NTB maintained by another WTO Member, to the relevant WTO body/committee for reference to the other party through the “NTB Resolution Mechanism”. The Member to which such a request is made would then be obliged to submit itself to the “NTB Resolution Mechanism”. The role of the “facilitator” would be to actively aid and advise the Members in reaching a solution that is workable and pragmatic, including by helping establish the facts of the matter and by providing advice and recommendations on possible solutions. The “facilitator” will also respect any mutually agreeable solution that is arrived at by the parties themselves.

(d) Sectoral/Plurilateral Elements

11. In recognition of the fact that several Members may face similar problems in a particular sector in the territory of another Member, the NTB Resolution Mechanism would allow affected Members to collectively present their problem. However, the time lines applicable to a one-to-one facilitation would also apply to group requests.

(e) Establishment of Facts and Trade Effects

12. The NTB Resolution Mechanism would have clear and short deadlines. An outcome should be sought within no longer than 60 working days of the appointment of the “facilitator”. In order to ensure speedy resolution, the affected Member or Members would submit a brief statement of issues describing the problem to the concerned WTO Committee. Pursuant to the selection of the “facilitator”, the affected Member(s) would submit a detailed statement of issue describing the NTB and identify the adverse trade effect. On receipt of the statement of issues, the same would be transmitted to the Member to which the request is made, who would submit its response along with any defenses. All such submission by Members will be within a fixed time-frame.

(f) Recommendations on the Solution

13. The “facilitator” would enable the Members to reach an amicable solution for the referred NTB. This would be a pragmatic solution based on the facts presented and with details as to actions required on the part of the concerned Members. The “facilitator” will fully take into account the particular problems and interests of the developing country Member, if any involved, while making the recommendation. The “facilitator” will also take into account the differential and more favourable treatment in the covered agreements while making his recommendations. It is reiterated that the “facilitator” would not be a passive listener; he would be empowered to offer solutions to resolve the issue. Considering that the facilitator would not approach the issue as a ‘dispute’ for the purpose of the DSU, the DSU would not apply to the procedures and recommendations of the “NTB Resolution Mechanism”.

(g) Flexibility of Procedure

14. The procedure would be flexible and the “facilitator” will be free to choose the preferred method. The “facilitator” would consult the involved Members either individually or collectively; the WTO Secretariat; affected industries; and other experts, including from industry and other non-governmental organizations. The procedure adopted will not be unduly burdensome for developing country Members. The result, either an amicable solution or the failure to reach such a solution, will

be recorded and forwarded to the relevant body/committee referring the matter to the “NTB Resolution Mechanism”.

15. Flexibility would also apply to the solutions sought. For example, where a Member feels that an interim solution is warranted, particularly in the case of perishable goods, the facilitator would explore this aspect as well and encourage the parties to reach an agreement on an appropriate interim solution.

(h) Implementation of Award

16. While participating in the procedure will be mandatory, implementation of the recommended solution will not be so. This is important as a mandatory implementation requirement will affect the legal rights of the Members concerned. Instead, any party unwilling to implement the recommended solution will be required to state its reasons in the relevant WTO body/committee, to which the original request for launching of the “NTB Resolutions Mechanism” was made.

17. As in a final result, the implementing Member would have the right not to implement an interim solution. Any decision not to implement the interim solution would have to be communicated with the reason to the “facilitator” and the referring Member.

(i) Right to Approach the DSU

18. This mechanism will be independent of the WTO’s dispute settlement mechanism. The “NTB Resolution Mechanism” would be without prejudice to the right of the Members concerned to approach the DSU at any stage of the process. Rights of Members under the DSU will be protected. Information exchanged or solutions reached during the process would not be used in any WTO dispute settlement procedure.

(j) Confidentiality

19. Central to the NTB Resolution Mechanism would be the principle that the process can be effectively facilitated only in an atmosphere of confidentiality. There shall be no third party participation unless both the parties agree to the same. This is expected to lay down the foundation for an open and effective interaction between the parties, and the options for a solution. The result of the process, which essentially lays down whether or not a solution was reached, including any interim solution, would be published and communicated to the relevant body/committee as a report. It is believed that under a confidential mechanism, Members may be more willing to make difficult but necessary concessions to reach a solution.
