

**MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS**

Negotiating Proposal on WTO Means to Reduce the Risk of Future NTBs  
and to Facilitate their Resolution

*Communication from the European Communities*

Addendum

The following communication, dated 28 April 2006, is being circulated at the request of the delegation of the European Communities.

1. In line with paragraph 16 of the Work Programme adopted at the WTO Ministerial Conference in Doha in November 2001, and paragraph 22 of the decision at the WTO Ministerial Conference in Hong Kong in December 2005, the European Communities (hereafter “the EC”) hereby submit its specific negotiating proposal on NTBs on WTO means to reduce the risk of future NTBs and to facilitate their resolution.

2. This EC negotiating proposal on NTBs builds upon and furthers the objectives set out in earlier EC communications to the Negotiating Group on Market Access (NGMA), notably its submission on 1 April 2003 (TN/MA/W/11/Add.3). The European Communities, in making the following proposal, also recognizes that other Members have been discussing and proposing the establishment of similar “horizontal NTB 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 the EC looks forward to cooperation with all interested Members.

**I. INTRODUCTION**

3. WTO Members at all levels of development, as well as representatives of their respective business communities, have expressed growing frustration with the lack of tangible progress in the negotiations on non-tariff barriers (NTBs) in NAMA. At the same time, with the exception of clarification and improvement of WTO disciplines (e.g. in the on-going DDA negotiations on Trade Facilitation), NTBs do not always easily lend themselves to traditional multilateral rounds of trade negotiations. In particular developing countries have found it difficult to identify, gather necessary information on and analyse individual NTBs for the negotiations – let alone pursue them, item-by-item, in the negotiations. Equally important, even if a country will be able to successfully address a particular issue, experience shows that new NTBs tend to crop up over time. One NTB is replaced by another, leaving the industry in the same situation as before. Moreover, in many cases the “source” of the NTB is a legitimate policy objective, unrelated to trade, yet the means of implementing it can have an undue trade-distorting effect.<sup>1</sup>

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<sup>1</sup> It should be recalled that not all NTBs are contrary to the WTO Agreement. As recognised in particular in Article XX of the GATT 1994, WTO Members may under certain conditions adopt measures to protect *inter alia* human, animal and plant life and the environment.

4. Therefore, there is a need to improve the available means for WTO Members and their industries to:

- (a) Reduce the risk of NTBs arising in the future;
- (b) Facilitate more rapid resolution of NTBs once the DDA negotiations are concluded.

## **II. REDUCING THE RISK OF FUTURE NTBS**

5. Despite ample existing requirements on transparency, there is still a shortage of readily available information for traders about relevant trade laws, regulations, decisions and administrative rulings of WTO Members. Many of the notified NTBs to the NGMA, and reoccurring complaints from industry, reflect this present information gap.

6. Shortage in accessible information can present a formidable challenge to exporters. At the very least, it raises the costs of participating in international trade. In some instances, these added costs and their unpredictable nature may present real entry barriers to foreign markets, especially for small and medium-sized companies and companies from developing countries.

7. In addition, inadequate information about potential trade effects on business in trade policy decision-making increases the risk that decisions are taken that perhaps unintentionally impede access. Transparent and open systems for consulting industries that could be affected by any measure ensure better-informed decisions and may be one of the most effective antidotes against new NTBs.

8. To reduce the risk of adoption of business unfriendly NTBs, the existing notification and transparency requirements under WTO rules should be re-examined, including the current use in some trade policy areas of enquiry points. Options for improving those requirements should be explored – ranging from notification and reverse notification requirements to, where possible, domestic consultative procedures which allow adequate and reasonable opportunity for interested traders and other non-governmental parties to express opinions on relevant trade policy legislation before its adoption – with the view to enhancing transparency for economic operators worldwide while taking into account the possible capacity constraints of developing countries.

## **III. FACILITATING THE RESOLUTION OF FUTURE NTBS**

9. More importantly, however, entrepreneurs must have an opportunity to swiftly and effectively tackle NTBs. The evolving nature of NTBs underscores the importance of empowering WTO Members to continuously address NTBs, as they occur, outside formal multilateral rounds of negotiations.

10. In the current WTO system, Members have two main options – WTO regular bodies and dispute settlement – for raising concerns with, and seeking solutions to, trade measures of other WTO Members that negatively affect the interests of their industries. In the case of most NTBs, countries raise their concerns in regular WTO bodies, through notifications and consultations, or in trade policy reviews, through the procedure of question and answers. But while these mechanisms are useful for clarifying certain trade policies of Members, they rarely help addressing NTBs and, to some extent, they were never set up for the purpose of problem-solving.

11. Conversely, the dispute settlement system of the WTO has proved capable of handling most, if not all, NTBs that Members have sought to address. However, compared to the number of NTBs of concern to industry, it would seem that Members generally have refrained from using dispute settlement for many NTBs, and the use of good offices, conciliation and mediation under the DSU has been even less common. This has in part to do with the costs and time associated with disputes, which reduce the incentive of pursuing less pertinent NTBs as well as place a burden that can be particularly

detering for developing countries. Another reason is that Members tend not to launch a dispute unless they have some good sense of the legality of an NTB, which in some instances may be difficult to determine due to the imprecise nature of WTO rules. Less clear, however, are the reasons for the lack of use of good offices, conciliation and mediation. The most likely explanation is that these procedures are still seen as too “close” to the dispute settlement process, and have been seen, therefore, in the same light.

12. Thus, there appears to be a need to improve problem-solving in WTO that would supplement the current options of dispute settlement and regular WTO bodies. This would of course have to be done without, in any way, interfering with Members’ rights and obligations under dispute settlement or under other current WTO Agreements. Instead, the objective would be to add to existing structures a new horizontal mechanism that enhances Members’ opportunities to address – in a conciliatory and expedient manner – any trade measure that affect trade with another Members. This would provide a means of resolution that could make resort to dispute settlement unnecessary in certain cases.

13. In conclusion, in order to facilitate progressive and more rapid resolution of future NTBs, the WTO system would benefit from:

- the establishment of **horizontal mechanism, in the form of a procedure for problem-solving in the area of NTBs**, with short time-lines, as well as with the involvement of a facilitator that can assist countries in reaching mutually agreed solutions.

14. A more detailed description of how any such mechanism would work has been further elaborated in the ANNEX.

## ANNEX

### **Parameters for a Problem-Solving Mechanism:**

#### **Facilitating the Resolution of Non-Tariff Measures Adversely Affecting Trade between WTO Members**

1. The Mechanism shall apply to non-tariff measures which adversely affect trade between WTO Members and, directly or indirectly, the operation of GATT 1994 or other multilateral agreements on trade in goods, without prejudice to the question whether or not the measures breach existing obligations or otherwise nullify or impair the balance of Members' rights and obligations under WTO Agreements.
2. Any Member, whose trade is adversely affected by a non-tariff measure of another Member, may request to begin the procedure under the Mechanism, as set out below. Such request shall be notified to the relevant WTO body. The request shall include a brief description of the matter sufficient to present clearly the measure in question and its trade effects. The Member to which such request is made shall favourably consider the request and provide a written reply to the notifying Member in no less than 10 days after the date of receipt of the notification. The reply shall also be notified to the relevant WTO body.
3. Upon launch of the procedure under this mechanism, the parties are encouraged to agree on a facilitator, which shall be an expert on the subject matter and act as a mediator.<sup>2</sup> The parties shall agree on the expert facilitator no later than 15 days after the receipt of the request, after which the parties shall inform the relevant WTO body of their choice.<sup>3</sup> If no expert facilitator can be agreed within the established time frame, and one of the parties so requests, the Director-General shall appoint the expert facilitator within 10 days of the request and after consulting the parties.
4. The purpose of the expert facilitator shall be to assist the parties in bringing clarity to the possible trade effects arising from the NTB in question and reaching a mutually agreed solution, without reference to the legality of the NTB.
5. In the initial stage of the procedure, within 15 days after the appointment of the expert facilitator, the party invoking the mechanism shall present the problem to the expert facilitator, in particular the facts and trade effects relating to the NTB at issue. Within 10 days after this presentation, the other party may provide its comments in writing to the expert facilitator. The expert facilitator may decide the most appropriate way of completing the fact-finding. In particular, the expert facilitator may decide whether to schedule a hearing of the parties, meet with any of the parties individually, seek the assistance of the Secretariat or consult with relevant experts, affected industry and other non-governmental organizations.
6. Following this fact-finding, the expert facilitator may provide advisory opinions and propose solutions to the notified matter for the parties' consideration. The expert facilitator may meet individually or jointly with the parties in order to facilitate a mutually agreed solution.
7. The procedure shall normally take no longer than 60 days from the appointment of the expert facilitator.

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<sup>2</sup> For example, in cases concerning standards and technical requirements, the panellists should preferably have a background in relevant international standard setting bodies.

<sup>3</sup> For example, in order to ease the appointment of a facilitator, relevant WTO bodies can establish rosters of potential facilitators, from which the parties may find the appropriate facilitator of mutual consent.

8. Consultations under the mechanism may take place in either concerned countries, in the WTO or in any other third place as per mutual convenience. All deliberations and information exchanged under the procedure of this Mechanism shall be strictly confidential. There shall be no third party participation in the process unless the parties mutually agree.

9. At the end of the procedure under the Mechanism, the expert facilitator shall report to the relevant WTO body to which the matter was originally notified, about (1) the process, (2) the fact-finding conducted by the expert facilitator and (3) the agreed solutions, if any. Any party unwilling to implement the proposed solutions by the facilitator is expected to state its reasons for not doing so.

10. The Mechanism is without prejudice to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), including Article 5, and Members' rights and obligations there under. Members may pursue under this mechanism any measure having a trade effect, without prejudice to its rights and obligations under the WTO Agreement. Members may pursue the same matter in parallel or subsequently under the DSU. Information exchanged and solutions explored under this Mechanism shall not be used in any subsequent dispute settlement procedure.

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