

MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

Horizontal questions concerning systemic issues related to the TBT Agreement
in Non-tariff barriers (NTBs) proposals listed in paragraph 24
of document TN/MA/W/103/Rev.3

Communication from Brazil

The following communication, dated 3 December 2009, is being circulated at the request of the delegation of Brazil.

This document follows the ideas expressed in document JOB(09)/103 and presents the main “cross-cutting” and systemic dispositions in the vertical proposals enrolled in paragraph 24, ‘b’, of the draft modalities document (TN/MA/W/103/Rev.3). The dispositions are formulated in such a manner they could be extended to be applied to all products, thus enhancing the implementation of the TBT Agreement.

This document does not intend to be exhaustive in relation to the “cross-cutting” dispositions present in the proposals circulated in this Negotiating Group that could be extended to all products, whether they are listed or not in paragraph 24, ‘b’. Furthermore, it does not preclude discussions on dispositions which are adequate only for sectoral application.

Brazil would like to stress its complete availability for discussing on the adequate instrument for the adoption of the following dispositions.

I. GOOD REGULATORY PRACTICE

A. Where a Member prepares or proposes to adopt a technical regulation or conformity assessment procedure, it shall:

- (1) consider, inter alia, the costs of complying with the proposed technical regulation or conformity assessment procedure.; and
- (2) consider the available regulatory and non-regulatory alternatives to the proposed technical regulation or conformity assessment procedure that may fulfill the Member’s legitimate objective, including the use of an existing international standard. This requirement does not imply any determination on the way or format this consideration shall take.

B. The process of determining whether an international standard, guide or recommendation within the meaning of Articles 2 and 5 and Annex 3 of the TBT Agreement exists should be based on

the principles set out in the *Committee Decision*¹, including whether the standardizing body takes into account relevant regulatory or market needs and scientific and technological developments as set out in paragraph 11 of the *Committee Decision* when preparing a standard, guide or recommendation. “Relevant regulatory market needs and scientific and technological developments” shall include the technical and economic feasibility of alternative approaches to the standard under development, the relative benefits and cost-effectiveness of alternative approaches and the available technologies, and shall take into account the particular situation of Developing Countries.

II. CONFORMITY ASSESSMENT PROCEDURES

A. When a supplier’s declaration is accepted as a positive assurance that a product conforms with a standard or technical regulation, the Member shall accept that the supplier in the exporting country has sole responsibility for issuing, changing or withdrawing the declaration of conformity. The Member may require that the declaration of conformity shall identify the supplier, or the supplier’s authorised representative, the goods covered by the declaration, and the technical regulations with which conformity is declared, as well as other information deemed necessary to assure the responsibility of the supplier and the reparation of the consequences of non-compliance. A Member may refuse to accept a declaration from any supplier if, upon request from the Member’s regulatory or enforcement authorities, the supplier does not provide to those authorities documentation necessary to demonstrate the basis for a declaration or declarations (e.g., relevant test results) within a reasonable period after the date of the request.

B. When practicable, especially taking into account possible capacity constraints of developing countries, Members requiring positive assurance of conformity for products covered by the TBT Agreement should endeavour to accept a supplier’s declaration of conformity

C. Where an assurance of conformity is required, Members are encouraged to accept that the supplier declares that the product meets the technical regulations on the basis of an assurance of conformity issued by a conformity assessment body approved for that purpose by the authorities of another Member when the conformity assessment body that issued it participates in relevant international accreditation systems in which that Member participates.

D. In the case a Member accepts, for a conformity assessment procedure, the recourse to conformity assessment bodies in the territory of other Members it shall accord to those conformity assessment bodies treatment no less favourable than that it accords to conformity assessment bodies in its own territory with respect to the procedures, criteria, and other conditions with which conformity assessment bodies must comply in order for the Member to accredit or otherwise approve them as competent to test or certify that a product conforms with the Member’s standard or technical regulation.

E. If a Member requires a conformity assessment body to comply with requirements concerning the assessment of conformity of a product with a standard or technical regulation or requires the body that accredits or otherwise approves the conformity assessment body to comply with requirements concerning that accreditation or approval, it shall ensure that such requirements are based on:

- (a) a relevant international standard, guide or recommendation that has been developed in accordance with the TBT Agreement and the *Committee Decision*; or

¹ G/TBT/1/Rev. 8, 23/05/2002, Section IX – “Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2 and 5 and Annex 3 of the TBT Agreement”.

- (b) a conformity assessment procedure established by the Member in accordance with the procedures set out in paragraphs XXX

III. TRANSPARENCY

A. The special development, financial and trade needs of developing country members will be taken into account when considering the costs of compliance and the available regulatory and non-regulatory alternatives, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country members.

B. Where a Member prepares, proposes to adopt or adopt a standard, technical regulation, or conformity assessment procedure that may have a significant effect on trade of other Members, the Member shall, in addition to Articles 2.9, 2.10, 5.6, 5.7 and paragraphs L through N of Annex 3 of the TBT Agreement:

- (a) upon request from another Member or interested party, provide information on how the Member took into account the elements set out in paragraph A
- (b) publish, in print or electronically, any written comments it received from Members or interested parties on the proposed standard, technical regulation, or conformity assessment procedure.
- (c) In the case of developed country members, publish, in print or electronically:
 - (i) its responses to any significant issues raised in comments it received from Members during the comment period;² and
 - (ii) the objective and rationale for preparing or adopting the standard, technical regulation, or conformity assessment procedure.
- (d) ensure that, in the case of central government bodies, its proposed and final standards, technical regulations and conformity assessment procedures, as well as any relevant penalties, are published in a single official journal of national circulation, and encourage their distribution through additional outlets.

IV. CONFIDENTIALITY OF INFORMATION

A. Nothing in the TBT Agreement shall be construed to require a Member to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

V. PROCEDURES FOR REVIEW

A. Each Member shall establish or maintain judicial, quasi-judicial, or administrative tribunals and procedures for the purpose of the prompt review and, where warranted, correction of its final administrative actions relating to technical regulations and conformity assessment procedures. Each Member shall ensure that such tribunals are impartial and independent of the office or authority entrusted with administrative enforcement and do not have any substantial interest in the outcome of

² For greater certainty, if raised in comments received from a Member or an interested party, a Member's response shall include a response to the items described in subparagraphs 3(i)-(iii).

the matter, and that proceedings before such tribunals are transparent and comply with due process of law.

B. Each Developed Country Member shall establish or maintain procedures for it to review, at regularly-scheduled intervals, its technical regulations and conformity assessment procedures to determine whether such measures should be modified or eliminated so as to make the Member's regulatory program more effective in achieving the legitimate objective(s) pursued. In reviewing its technical regulations and conformity assessment procedures to determine whether such measures should be modified or eliminated, relevant elements of consideration include whether such technical regulations and conformity assessment procedures have become unnecessary or outdated by reason of changed circumstances, such as fundamental changes in technology. Developing Country Members are encouraged to apply the provisions of this Article.

VI. SPECIAL AND DIFFERENTIAL TREATMENT

A. The dispositions in this instrument shall be applied without prejudice to the full applicability of special and differential treatment dispositions of the TBT Agreement. In particular, the special development, financial and trade needs of developing country members will be taken into account when considering the costs of compliance and the available regulatory and non-regulatory alternatives, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country members.
