



NAMA NEGOTIATIONS: AN ENVIRONMENTAL PERSPECTIVE

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Introduction

In November 2001, Trade Ministers meeting at the 4th Ministerial Conference in Doha, Qatar, agreed to launch a new round of WTO trade negotiations. In addition to ongoing negotiations on agriculture and services, Ministers agreed to begin negotiations on a number of issues, including non-agricultural market access (market access for industrial goods). The Doha Declaration was termed the “Doha Development Agenda”, to illustrate its focus on improving international trade rules for the specific purpose of contributing to the development of the world’s poorest countries.

In the context of non-agricultural market access (NAMA) negotiations, the Doha Declaration instructs WTO Members “...to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries...”¹. Much of the discussion in the negotiations to date has centered around cutting tariffs, that is to say, determining how WTO Members will agree to lower the taxes they charge on foreign products entering at their borders. In that context the discussion has focused on variations of different formulae that, if agreed, would then be applied by all Members to systematically reduce their current tariff levels. The type and construction of the formula has been a point of controversy, and WTO Members have been divided on the issue largely, but not exclusively, along developed-developing country lines. In addition, small groups of countries have begun additional “informal” negotiations on the complete elimination of tariffs in specific sectors, including environmentally-sensitive sectors such as forestry products and fisheries. Little, if any, attention is being paid to environmental considerations in this aspect of the negotiations, despite literature and impact studies suggesting that negative environmental impacts may be a likely outcome for many countries if trade in forest and fishery products are further liberalized.

The second main aspect of the NAMA negotiations is the discussion related to ‘non-tariff barriers (NTBs)’. NTBS are all measures, other than tariffs, that control the flow of imports into a country. The term ‘non-tariff barrier’ inspires a negative or illegitimate connotation. However, the majority of NTBs arguably are perfectly legitimate and legal under WTO law. Take, for example, safety regulation on children’s toys or health and sanitary standards on food products. Many prefer to refer to these types of regulations and standards as non-tariff “measures” rather than “barriers” because, although they may affect international trade flows, they are generally

¹ Doha Ministerial Declaration, paragraph 16 (November 2001). The text of the Declaration is available on the WTO website at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

considered to be important measures taken to pursue legitimate public policy objectives. Other NTBs, such as unreasonable delays at the border or hidden customs requirements, may not be tied to a public policy objective, and could seriously inhibit exports, including from developing countries.

The discussion on non-tariff barriers has received less attention than the tariff-cutting formula and possible sectoral arrangements, although for many countries the market access implications of NTBs are just as important as the effects of tariffs on their exports. Because market access conditions are the result of the combination between tariff and non-tariff barriers, NTBs can have a significant impact on developing country exports, even in cases where tariff treatment is already very favourable.² This is not uncommon, as developed countries already have, on average, relatively low tariffs on most products. Hence, it was at the insistence of developing countries in Doha that NTBs be included in the negotiations on NAMA, both to address the use of non-transparent NTBs in developed countries, and to counterbalance the effects of reducing their own tariffs.

In the process of negotiating NTBs, Members notified the Negotiating Group on Market Access (NGMA) of non-tariff measures that were problematic for their exporters. The results of this exercise show that several Members, from both developed and developing countries, have notified various environmental, safety and/or health standards as barriers to their exports, even though these are presumably WTO-compliant and pursuing legitimate public policy objectives.³ It is essential that the notification exercise distinguish between the question of legitimacy and legality of the notified measures on the one hand, and the impact of the measure on the other. Under no circumstances should these notifications result in the watering-down of legitimate existing standards, nor should additional strictures be put on the domestic policy space available to Members to pursue legitimate objectives for the protection of human health and safety, and the environment.

The intention of this note is to provide an environmental perspective on the state-of-play of the sectoral agreement and non-tariff barrier discussions in the NAMA negotiations. While recognizing the sensitivity of this topic to development related concerns, the objective of this note is to re-situate environmental considerations within the NAMA negotiations as a vital element of ensuring sustainable development.

I. Tariff Elimination by Sectoral Agreements

A. Background

² For the sake of illustration, non-tariff barriers (such as rules of origin, anti-dumping and TBT) applied to products originating in LDCs can be cited. See for instance the Note by the WTO Secretariat, *Market Access issues related to products of export interest originating from least developed countries*, TN/MA/S/7.

³All notifications are available on the WTO web site (www.wto.org). For an overview and compilation of information, see the following publications from Friends of the Earth International: *Analysis of Notifications of Non-Tariff Barriers in the NAMA Negotiations*, and *Database of Selected Notifications*, available on the web at <http://www.foei.org/trade/nama.html>.

Although sectoral agreements for tariff elimination have generally been opposed by developing countries, notably Chile and Brazil, this process has moved forward informally amongst interested Members. Most developing countries have not considered it to be in their interest to scatter tariff negotiations into individual discussion groups on a sectoral basis. Nonetheless, the Chairman of the NGMA, Ambassador Stefan Johanesson, indicated in his July 2005 report on the state-of play that sectoral discussions are “taking place in informal Member-driven processes based on the critical mass approach.”⁴ It is expected that a small group of countries will agree to eliminate tariffs in a variety of sectors, which they will present to the NAMA group as finished deals. In this case, they would extend the benefits to all Members although the commitments would only be binding on the small group of countries involved. The Chairman’s Report notes nine sectors in which negotiations are already underway, of which four may be considered environmentally-sensitive sectors: fisheries, forest products, chemicals, and raw materials.⁵

B. Considerations for the Negotiations

There are no indications that WTO Members are taking environmental considerations into account as they engage in tariff elimination negotiations in sensitive sectors. This, despite the fact that some evidence exists to show the likely negative environmental impacts some countries will experience as a fallout of complete tariff elimination. For example, the European Union commissioned a Sustainability Impact Assessment (SIA) of the WTO Negotiations, which was published in June 2005 by the Impact Assessment Research Centre at the University of Manchester. On NAMA negotiations, the SIA focuses on liberalization of the forestry products sector. Using a model scenario of full liberalization (zero tariffs), the SIA study predicts that “[d]eveloping countries and also some of the transitional economies that have problems with forest governance may face considerable environmental and social costs, which could offset economic gains from further trade liberalization unless adequate safeguards are adopted.”⁶ While some proponents of sectoral agreements argue that increased economic activity will allow developing countries to re-invest in environmentally-sound infrastructure, the EU SIA finds that complete liberalization “would likely be a magnifier of existing policy and institutional strengths and weaknesses rather than a major driver of forest governance change as such”.⁷

Additionally, Canada’s Environmental Assessment of the WTO negotiations acknowledges that, for all industries, increases in production have the “potential to cause certain environmental impacts”.⁸ Canada identifies the mitigating factors it has in place to counterbalance negative environmental effects in various sensitive sectors, such as, for example, increases in “research and development funding, targeting environmental and production issues” in the fisheries and fish products sector. However, it is reasonable to assume that many

⁴ *State of Play of NAMA negotiations: Chairman’s commentary*, WTO JOB(05)/147, at p.5. (8 July 2005)

⁵ *Id.*

⁶ Colin Kirkpatrick and Clive George, *Sustainability Impact Assessment of Proposed WTO Negotiations: Overall Project Final Report*, Impact Assessment Research Centre, University of Manchester, at p.16. (June 2005). Available at <http://www.sia-trade.org/wto/index.htm>.

⁷ *Id.*

⁸ *Initial Environmental Assessment: Trade Negotiations in the World Trade Organization*, International Trade Canada, at p.27. (November 2002). Available at <http://www.dfaid-maeci.gc.ca/tna-nac/ea1105-en.asp>.

developing countries do not as yet have the resources to develop strong fisheries regulatory schemes.

Negotiations involving environmentally sensitive sectors should not proceed without adequate impact assessments. WTO Members, in fulfilling their commitment to sustainable development, should *at a minimum* take into consideration existing assessments relating to the liberalization to specific sectors. Where such assessments do not exist, Members should increase their commitment to identify and assess possible environmental and social impacts. Mitigation options and strategies should then be integrated into the negotiations.

II. Non-Tariff Barrier Negotiations

A. Background

At the WTO General Council meeting in July 2004, Members reiterated the importance of NTBs to the NAMA negotiations in the Annex of the Chairman's statement, commonly referred to as the "July Framework", which read as follows:

"We recognize that NTBs are an integral and equally important part of these negotiations and instruct participants to intensify their work on NTBs. In particular, we encourage all participants to make notifications on NTBs by 31 October 2004 and to proceed with identification, examination, categorization, and ultimately negotiations on NTBs. We take note that the modalities for addressing NTBs in these negotiations could include request/offer, horizontal, or vertical approaches; and should fully take into account the principle of special and differential treatment for developing and least-developed country participants."

The Chairman of the NGMA conducted two notification exercises, in which Members were invited to notify the NAMA group of NTBs that hindered their exports in various markets. Although the 31 October deadline has passed, Members have continued to submit notifications, and developing countries have been encouraged to continue doing so, to ensure that there is a balanced set of interests on the table when real negotiations begin. Thirty-two WTO Members submitted notifications, nineteen of which are developing countries. It is important to note that only three African countries (Egypt, Kenya, and Senegal), and one least-developed country (Bangladesh) have submitted notifications.⁹

Following the two notification exercises, the WTO Secretariat provided compilations of the proposals submitted regarding NTBs¹⁰. The most recent compilation, dated 29 October

⁹ Argentina, Australia, Bangladesh, Bulgaria, China, Chinese Taipei, Croatia, Cuba, EC, Egypt, Hong Kong, India, Japan, Jordan, Kenya, Korea, Macao, Malaysia, Mexico, New Zealand, Norway, Pakistan, Philippines, Senegal, Singapore, Switzerland, Thailand, Trinidad and Tobago, Turkey, Uruguay, USA, and Venezuela. Notifications are compiled in WTO Secretariat documents TN/MA/W/25 (including Addenda 1 & 2), as well as TN/MA/W/46 (including Addenda 1 - 12).

¹⁰ TN/MA/9/Rev. 1, dated 29 October 2004, consolidated twenty-six submissions. TN/MA/9, dated 7 April 2003, consolidated eighteen submissions from Members.

2004, consolidated twenty-six submissions from Members and distilled three central issues for discussion: whether to address the broad range of non-tariff measures identified or whether to limit the focus; the appropriate WTO Committee or negotiating group in which to address the NTBs; and the appropriate modalities (in other words, methodology) for negotiation of NTBs.

The Chairman's July 2005 report on the state-of-play of the NAMA negotiations made a short reference to NTBs. It did not introduce any new ideas for modalities, and indicated that while progress had been made in discussions on NTBs, real negotiations are not likely to start until after the 6th Ministerial Conference in Hong Kong, December 13-18, 2005.

B. The Classification of NTBs

The idea of categorizing NTBs emerged as a pre-requisite to the establishment of modalities. In other words, Members would first identify the barriers and what was to be negotiated, and only then decide where and how to approach them (modalities). In its compilation of proposals submitted by Members on NTBs, the Secretariat identified four categories of NTBs¹¹.

NTBs in **Category 1** are those that are covered by an existing WTO Agreement that does not have a specific separate negotiating mandate. For instance, many of the non-tariff measures notified relate to regulatory measures taken by Members that fall under the scope of the Agreement on Technical Barriers to Trade (TBT). The TBT Agreement is a standing Agreement of the WTO and not part of the Doha Round of negotiations, although the TBT Committee meets throughout the year to discuss issues related to implementation of the Agreement. Other NTBs of this category include those covered by the Agreement on Import Licensing Procedures; the Agreement on Rules of Origin; and the Agreement on the Application of Sanitary and Phytosanitary (SPS) measures.

Because these agreements (or provisions) were not given a specific mandate to be re-negotiated, some Members are of the view that this category of NTBs can only be addressed through dispute settlement or, at most, be discussed in the relevant WTO Committees (such as the TBT Committee, as described above). They feel that anything else would imply the "re-opening" of the existing Agreements in absence of a specific negotiating mandate. Most agreements, such as those on TBT and SPS, were difficult to negotiate and conclude. Consequently, Members are concerned that addressing NTBs related to these Agreements would result in a protracted re-negotiation of the entire agreement. Re-negotiation of WTO agreements can occur, but only following instructions from Ministers at a Ministerial Conference.

NTBs in **Category 2** are those that are covered by a specific WTO Agreement, which is also the subject of a specific separate negotiating mandate. For instance, some of the NTBs identified relate to rules on the dumping of products and retaliatory measures. These NTBs would be covered by the Agreements on Anti-Dumping, and on Subsidies and Countervailing Measures (SCM), which are currently being discussed within the context of the Doha-mandated negotiations on Rules.

¹¹ See WTO document TN/MA/9/Rev.1.

Negotiations of this category of NTBs are less contentious since they are the subject of a double mandate (for instance, both as part of the Rules negotiations, and as NTBs in the NAMA negotiations). The main issue then is whether to address them in their respective negotiating groups (likely, yes), and how to do so. Work is already underway in these areas in the Negotiating Group on Rules.

Category 3 NTBs are defined as barriers that are not specifically covered in an existing WTO Agreement, but that are related to aspects of the Doha Work Programme. For instance, several barriers identified by Members are related to customs procedures, which are being discussed in the negotiations to develop rules on Trade Facilitation.

NTBs in **Category 4** are classified as barriers that are not covered in a specific WTO Agreement, and are not the subject of a separate negotiating mandate. Some of these measures include tariff classifications, quotas, export taxes, ‘buy national’ campaigns, fiscal incentives, and tax and duty exemptions. Although partially covered by or linked to specific provisions of the GATT 1994, these NTBs do not fall under the scope of a specific WTO Agreement, nor are they the subject of a separate negotiating mandate. Thus, they raise two issues for consideration: first, whether they are closely enough related to the negotiations to be negotiable, and second, in which WTO Committee or negotiating group they should be discussed. However, the language of the Doha Declaration does appear to indicate that the mandate covers all NTBs, irrespective of their classification and whether they relate to an existing WTO Agreement or are subject of a separate negotiating mandate.

C. Proposals by Members on Modalities

The Doha Declaration does not instruct Members to begin NTB discussions by categorizing them, although it can be a useful exercise to assess and describe the notifications submitted. However, the notification exercises have been perceived as extremely difficult and complex for many, especially smaller, developing countries. As a result, many have not notified the NTBs problematic for their industry. The overall picture of notifications is thus not representative of developing country concerns. It is also noteworthy that, following the exercises on notification and classification, only seven Members submitted proposals to the NGMA on possible modalities for addressing NTBs in the next stage of negotiations. Only one of the seven proposals emanated from a developing country (Chile).

A common theme among the proposals is the separation of NTB negotiations into 3 different fora: ongoing WTO Committee work (i.e., the TBT Committee); other negotiating groups (i.e., negotiating groups on Trade Facilitation and Rules); and the NAMA negotiating group. Several proposals support a horizontal approach to negotiations, which would have Members discuss several selected NTBs across all sectors. Some Members have strongly advocated a vertical approach, which would focus discussion on NTBs of interest to particular industries. However, this suggestion could be problematic for some developing countries that do not want to establish any formal link between a vertical approach in NTB negotiations and the possibility of sectoral initiatives in tariff formula negotiations. Those Members supporting a vertical approach to modalities favour the use of plurilateral group discussions, with the results

to be applied on a most-favoured-nation basis. In other words, a small group of interested countries would decide to address NTBs in a particular sector, and then apply the benefits of these new rules to all Members (although those not party to the discussions would not be bound by the rules).

Some Members have proposed that NTBs covered in the existing agreements should be addressed through dispute settlement as a "compliance" issue, and not through negotiations. Their argument is that the NTBs faced by exporters in practice sometimes occur because Members are not appropriately implementing their commitments.

Members' suggestions for modalities are summarized below as outlined in the various proposals.

Category of NTBs	Approaches to Modalities	Country Proposal
Category 1: Agreement-specific NTBs, falling outside the Doha negotiating mandate (i.e., TBT, AIL)	To be discussed and clarified within the relevant Committees, keeping NGMA informed for transparency	Chile, Canada, EC Japan, New Zealand, USA
	To be discussed on a request-offer basis within the NGMA, to be applied on an MFN basis.	Chile, USA
	Dispute settlement, where the NTB is related to issues of non-compliance	New Zealand, USA
Category 2: NTBs related to an existing WTO Agreement, also subject to a negotiating mandate	New rules and commitments to be discussed in the relevant negotiating groups (i.e., Rules) using multilateral, plurilateral or bilateral (request/offer) approaches.	Chile, Canada, European Communities, Korea, New Zealand, USA
Category 3: NTBs not related to an existing WTO Agreement, but related to the Doha negotiations	New rules and commitments relating to customs procedures to be discussed in the Trade Facilitation negotiations, using multilateral, plurilateral or bilateral (request/offer) approaches.	Chile, Canada, European Communities, Korea, New Zealand, USA
Category 4: NTBs related to unclear provisions of the GATT, falling into NGMA	Vertical/Sectoral (i.e., automobiles; wood products; electronics; textiles), using plurilateral or bilateral approaches	Korea, Japan, New Zealand, USA
	Horizontal (across all sectors), using multilateral approaches	Canada, Chile, EC, New Zealand, Japan, US

<p>Class-based (i.e., quotas, export taxes, buy national campaign), horizontally and/or vertically, using multilateral, plurilateral or bilateral approaches.</p>	<p>EC, New Zealand</p>
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D. Considerations for the Negotiations

It is arguably sensible to treat NTBs in Category 2 (those pertaining to an Agreement with a specific negotiating mandate) and Category 3 (those relating to another area of the Doha Declaration) in the relevant negotiating group. Many of the NTBs notified that fall into these categories pertain to clarifications and improvements to non-transparent customs procedures and anti-dumping provisions, where work is currently taking place in the Negotiating Groups on Trade Facilitation and Rules, respectively. However, it is important that these groups regularly report back to the NGMA, because smaller developing countries do not have the capacity to follow negotiations spread over a large number of different negotiating bodies.

Some of the non-tariff measures that have been notified and fall into Category 1 (those pertaining to an existing Agreement without a specific negotiating mandate) and Category 4 (those not pertaining to any Agreement) are alarming from an environmental perspective. For instance, the United States has notified a policy that promotes fuel efficiency, distinguishing between vehicles based on engine size. Japan has notified the new REACH legislation in the EU as problematic, which covers registration and authorization for chemicals. China has notified several EU directives that promote energy efficient policies for household appliances, air conditioning units and heating, while India has identified “measures used to implement International Organization for Standardization’s ISO 14000 and ISO 8000 standards – on environmental management system” as being problematic for its exporters. Thailand has notified requirements to label fish and seafood containing more than 1% of genetically modified organisms, and to label tuna as being ‘dolphin-friendly’.¹²

It is essential that these notifications relating to environmental standards do not call into question the legitimacy or legality of those measures. An appropriate solution cannot lie in diluting existing environmental standards, or rolling back Members’ abilities to adopt new legislation in the pursuit of legitimate policy objectives. The current WTO legal framework, framed by existing rules and jurisprudence, is already sufficiently strict so as to prohibit the adoption of meaningless or superficial environmental, health, or safety standards. At the same time, however, negotiators must acknowledge that a number of environmental non-tariff measures have been notified by developing countries as problematic and that these must be addressed. From a development perspective, and recalling the objectives of the Doha Development Agenda, the disconnect between legitimate standards and regulations of developed countries and the lack of capacity of developing country exporters to meet them, cannot be ignored. This requires focusing on the specific needs of developing country exporters (rather

¹² See www.wto.org. See also, the Friends Of the Earth International Analysis and Database, *supra* note 3.

than of developed countries) and moving away from the mistaken idea that those non-tariff measures notified in the NAMA process are automatically illegal or illegitimate.

Concluding Remarks

The Chairman's report to the General Council in July 2005 indicated that negotiations on sectoral agreements would be ongoing informally, and encouraged "substantive reporting in the multilateral setting"¹³ to ensure transparency. It is essential that WTO Members and stakeholders insist on a transparent negotiating process that will ensure that sufficient information is available to assess the environmental trends that are likely to result from proposed liberalization in sensitive sectors such as forestry and fish products, chemicals and raw materials. Negative environmental impacts could be particularly significant in these areas for countries that do not have established structures of environmental governance.

The NGMA Chairman's report also stated that NTB negotiations would likely begin in earnest in 2006. While on the one hand this indicates that NTBs have, for the moment, taken a backseat in the negotiations, this reprieve may give developing countries extra time to consult with their domestic industry to identify current barriers and to clarify areas where they have offensive interests. NTBs were included by developing countries in the Doha Declaration to ensure a balanced outcome in the NAMA negotiations. In order for this to be achieved, it is essential that developed countries not be allowed to use their well-coordinated industry and negotiating influence to hijack the discussions solely for their own benefit.

Of equal importance, it must be noted that these discussions on NTBs are not, and should not be transformed into, negotiations that call into question legitimate public policy measures at the domestic level. While all standards and regulations may constitute non-tariff *measures*, not all should be considered as *illegitimate barriers*. Negotiators need to be creative in tailoring ways to address developing countries' concerns relating to NTBs where they might collide with legitimate public policy interests, such as public health, safety and environmental protection. So far, no concrete options have been tabled that would assist developing country exporters in meeting developed country standards.

¹³ *Supra* note 4.