

**CONCEPT PAPER:
IMPROVING WTO MEANS TO
REDUCE THE RISK OF FUTURE NTBS
AND TO FACILITATE THEIR RESOLUTION**

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.¹

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

1. Reduce the risk of NTBs arising in the future;
2. Facilitate more rapid resolution of NTBs once the DDA negotiations are concluded.

REDUCING THE RISK OF FUTURE NTBS

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.

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

¹ 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.

barriers to foreign markets, especially for small and medium-sized companies and companies from developing countries.

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.

To reduce the risk of adoption of business unfriendly NTBs, the existing notification and transparency requirements under WTO rules should be re-examined and options for improving those explored, with the view to enhancing transparency for economic operators worldwide.

Without prejudice to the specific requirements under existing WTO agreements, and taking into account the possible capacity constraints of developing countries, a horizontal obligation of WTO Members to publish measures that could have an impact on trade, both well before and after they have entered into force, and to establish one or more domestic enquiry points in relevant areas of trade policy currently covered by the WTO would be a significant improvement. These enquiry points could also be periodically communicated to the WTO and, if possible, have direct web links on the WTO web page. Industry operators could directly access information without being dependant on WTO notifications. Moreover, guidelines could be outlined for the establishment of domestic 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.

FACILITATING THE RESOLUTION OF FUTURE NTBS

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.

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. 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.

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.

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.

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

**PARAMETERS FOR A HORIZONTAL MECHANISM TO FACILITATE
THE RESOLUTION OF NTBS BETWEEN WTO MEMBERS**

1. The Mechanism shall apply to non-tariff measures which 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 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 an expert panel consisting of three to five industry/subject experts.² One of the panellists shall act a facilitator for the procedure, acting as chair of the panel and as a mediator. The parties shall agree on the panellists no later than [30] days after the receipt of the request, after which the parties shall inform [the relevant WTO body] of their choice. If no panel can be agreed within the established time frame, and one of the parties so requests, [the Director-General] shall appoint the panellists within [10] days of the request and after consulting the parties.
4. The purpose of the panel of experts 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 30 days after the appointment of the panellists, the party invoking the mechanism shall present the problem to the expert panel, in particular the facts and trade effects relating to the NTB at issue. Within 15 days after this presentation, the other party may provide its comments in writing to the expert panel. The expert panel may decide the most appropriate way of completing the fact-finding. In particular, the expert panel 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 panel may provide advisory opinions and propose solutions to the notified matter for the parties' consideration. The expert panel may meet individually or jointly with the parties in order to facilitate a mutually agreed solution.

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

7. The procedure shall normally take no longer than [90] days from the appointment of the expert panel.

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 panel 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 panel 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 thereunder. 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. Solutions explored under this Mechanism shall not be used in any subsequent dispute settlement procedure.
