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MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

MINISTERIAL DECISION ON PROCEDURES FOR THE FACILITATION OF SOLUTIONS TO NON-TARIFF BARRIERS

*Communication from the African Group, Canada, European Union, LDC Group, NAMA-11,
Group of Developing Countries, New Zealand, Norway, Pakistan and Switzerland*

Revision

The following communication, dated 3 February 2010, is being circulated at the request of the delegations of the African Group, Canada, European Union, LDC Group, NAMA-11, Group of Developing Countries, New Zealand, Norway, Pakistan and Switzerland.

MINISTERIAL DECISION ON PROCEDURES FOR THE FACILITATION OF SOLUTIONS TO NON-TARIFF BARRIERS

Ministers,

Recalling that in paragraph 16 of the Doha Ministerial Declaration, Annex B of the Framework Agreement and paragraph 22 of the Hong Kong Ministerial Declaration, Members agreed to negotiations on, *inter alia*, reduction or as appropriate elimination of non-tariff barriers, in particular on products of export interest to developing countries,

Conscious of the fact that non-tariff measures vary significantly in form, effects and objectives, and that non-tariff measures can serve legitimate and important purposes pursued by Members, whilst non-tariff measures may also constitute barriers that affect market access opportunities for other WTO Members and potentially impair benefits sought to be achieved from the reduction or elimination of tariffs,

Recognizing that flexible and expeditious procedures of a conciliatory and non-adjudicatory nature, involving a facilitator, may promote mutually acceptable solutions to Members' concerns regarding non-tariff barriers that aid exporters and importers, while respecting the legitimate objectives of the Members maintaining the measures,

Recognizing that these procedures neither alter nor address the rights and obligations of Members under the WTO Agreement,

Recognizing that these procedures build upon and further the objectives of existing procedures in WTO bodies,

Emphasizing that the procedures under this Decision are not intended to replace or otherwise affect the Understanding on Rules and Procedures Governing the Settlement of Disputes, and Members' rights and obligations thereunder,

Decide as follows:

GENERAL PROVISIONS

1. Pursuant to this Decision, any Member may seek to address through recourse to the procedures set out below its concerns regarding any non-tariff barrier ('NTB'), as specified in Annex 1 of this Decision, which it believes adversely affects its trade.
2. These procedures shall neither enforce any rights or obligations under the WTO Agreement nor add to or diminish the rights and obligations of Members, and shall be without prejudice to Members' rights and obligations under the Understanding on Rules and Procedures concerning the Settlement of Disputes ("DSU"). **They are not intended to serve as a basis for the interpretation or the enforcement of specific obligations under the WTO Agreement or for dispute settlement procedures, or to impose new policy commitments on Members.**
3. These procedures shall be applied in the context of relevant WTO Committees¹.
4. Any time limit referred to in this Decision may be modified by mutual agreement between the Members involved in these procedures.
5. At all stages of these procedures, the special situation of least-developed country Members involved in these procedures shall be given particular consideration. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member and solutions explored shall take into consideration the specific situation of the least-developed country Member involved, if any.

PROCEDURES FOR ADDRESSING CONCERNS REGARDING NTBS

Stage I: Request and Response on a Specific NTB

6. Any Member (the 'requesting Member') may, individually or jointly with other Members, initiate Stage I of these procedures by submitting in writing to another Member (the 'responding Member') a request for information regarding a non-tariff barrier. The request shall identify and describe the specific measure at issue and provide a detailed description of the requesting Member's concerns regarding the measure's impact on trade.
7. The responding Member shall provide, within [20] days, to the extent practicable, a written response containing its comments on the information contained in the request. Where the responding Member considers that a response within [20] days is not practicable, it shall inform the requesting Member of the reasons for the delay, together with an estimate of the period within which it will provide its response.
8. Upon submission, the requesting Member shall notify its request to the relevant WTO Committee², which shall circulate it to all Members. The responding Member shall equally notify its

¹ The relevant WTO Committee is the one overseeing the operation of the WTO agreement most closely related to the measure at issue. If there is no such Committee for a particular measure, the request shall be notified to the Council for Trade in Goods.

response to the relevant WTO Committee, which shall circulate it to all Members. Following the receipt of these notifications, upon the request of either the requesting or the responding Member (hereinafter referred to as “the parties”), the Chairperson or one of the Vice Chairpersons of the relevant WTO Committee shall convene a meeting with the parties to *inter alia* address any outstanding issues and explore possible next steps.

Stage II: Resolution Procedures

9. Following this initial information exchange under Stage I, the parties shall decide on whether to proceed to Stage II of these procedures. Stage II of these procedures may only be initiated by mutual agreement of the parties. However, if one of the parties requests to proceed to Stage II of these procedures, the other party shall accord sympathetic consideration to that request.

10. The parties shall notify any decision to proceed to Stage II to the relevant WTO Committee, **which shall circulate it to all Members.**

11. Any other Member may submit a written request to the parties, within [10] days of notification under paragraph 10, that it be permitted to participate in these procedures as a third party. Such other Member may participate in these procedures if both parties so agree and on the terms agreed to by the parties.

11*bis*. Once initiated, Stage II shall be terminated upon request of either party.

Appointment of a Facilitator

12. Upon their agreement to initiate Stage II of these procedures, the parties may request that the Chairperson of the relevant WTO Committee, (or if it is unclear which agreement is most closely related, the Chairperson of the Council for Trade in Goods), or one of the Vice Chairpersons, serve as facilitator. Alternatively, the parties may request that a Friend of the Chair agreed upon by the parties serve as facilitator. If the parties cannot agree on the appointment of a facilitator within [15] days of the initiation of Stage II of these procedures, and if one of the parties so requests, the [Chairperson of the Council for Trade in Goods] shall appoint the facilitator within an additional [10] days and after consulting the parties. The selection of facilitator shall take place in accordance with Annex 2 of this Decision.

Seeking Mutually Agreed Solutions

13. The facilitator, in consultation with the parties, shall have full flexibility in organizing and conducting the deliberations under these procedures, which normally should take place at the WTO headquarters, unless the parties agree on any other place of mutual convenience, taking into account possible capacity constraints of developing country parties. The facilitator and the parties may rely on existing working procedures of any WTO Committee concerned, to the extent they are relevant for the prompt resolution of the NTB in question. Video conferencing and other telecommunication facilities may be utilized, if considered suitable and agreed to between the parties.

14. Either party may present to the facilitator and the other party any information that it deems relevant.

² If the Committee to which these communications were notified considers itself not to be the relevant Committee, it shall forward the notifications to the Committee overseeing the operation of the WTO agreement most closely related to the measure at issue, or if it is unclear which WTO agreement is most closely related, to the Council for Trade in Goods.

15. In assisting the parties, in an impartial and transparent manner, in bringing clarity to the NTB concerned and its possible trade-related impact, the facilitator may:

- (a) offer advice and propose possible solutions for the parties' consideration, taking into account the information presented by the parties; *provided* any such opinion shall not pertain to the WTO consistency of the NTB, the parties' rights and obligations under the WTO Agreement, or to any possible legitimate objectives for the maintenance of the measure;
- (b) organize meetings between, and meet individually or jointly with, the parties, in order to facilitate discussions on the NTB and to assist in reaching mutually agreed solutions;
- (c) seek assistance of the WTO Secretariat and, after consulting with the parties, consult with relevant experts and stakeholders; and
- (d) provide any additional support requested by the parties.

16. The parties shall endeavour to reach a mutually agreed solution within [60] days from the appointment of the facilitator. Pending final resolution of the NTB, the parties may consider possible interim solutions, especially if the NTB relates to perishable goods.

Confidentiality

17. All meetings and information (whether provided in oral or written form) acquired pursuant to paragraphs 14, 15 and 16 of these procedures shall be confidential and without prejudice to the rights of any party or other WTO Member in any dispute settlement proceeding under the DSU. **The obligation of confidentiality does not extend to factual information already existing in the public domain.**

17bis. Nothing in this Decision shall require Members to disclose confidential information, which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

17ter. Any third party admitted to the procedures under paragraph 11 shall be bound by the confidentiality requirements pursuant to these procedures.

Outcome and Implementation

18. Upon termination of Stage II of these procedures by a party or in the event that the parties reach a mutually agreed solution, the facilitator shall issue to the parties, in writing, a draft factual report, providing a brief summary of (1) the NTB at issue in these procedures; (2) the procedures followed; and (3) any mutually agreed solution reached as the final outcome of these procedures, including possible interim solutions. The facilitator shall provide the parties [15] days to comment on the draft report. After considering the comments of the parties **submitted within the period**, the facilitator shall submit, in writing, a final factual report to the relevant WTO Committee **within [15] days of receiving the comments. The factual report shall not provide any interpretation of the WTO Agreement regardless of any prior reports of the panels or the Appellate Body of the DSU.**

19. If the parties reach a mutually agreed solution, such solution shall be implemented in conformity with the WTO Agreement.

FINAL PROVISIONS

Transparency

20. Notifications pursuant to this Decision and the facilitators' final factual reports **submitted to the relevant WTO Committees pursuant to this Decision** shall constitute regular items on the agenda of the relevant WTO Committees. Adequate opportunity shall be provided for an exchange of views amongst Members in the relevant WTO Committee.

21. For the purpose of transparency, the Chairpersons of the relevant WTO Committees or, when applicable, the Council for Trade in Goods shall provide to Members, on an annual basis, a status report of notified requests and responses and of ongoing and recently completed procedures, together with a list of any reports from facilitators.

Technical Assistance

22. Developing country Members and in particular least-developed country Members may request assistance from the WTO Secretariat to promote their understanding of the use and functioning of these procedures. Technical assistance required by least-developed country Members will be made available through the Technical Assistance Programmes of the WTO. Developed country Members are encouraged to provide technical assistance, *inter alia*, to share with developing country Members their experience for effective participation in these procedures.

Application and Review

23. The Council for Trade in Goods and the relevant Committees¹⁵ shall apply this Decision and implement it within the framework of their work from the date of the adoption of this Decision. The Council for Trade in Goods and each Committee to which this Decision applies may decide, by consensus, to modify certain procedural aspects of this Decision. Any modifications shall apply only within the Council or Committee that has adopted the modifications and only to procedures initiated after the date of effectiveness of the decision on the modifications.

24. In light of experience gained from the operation of these procedures, the [Council for Trade in Goods] will undertake a review of the effectiveness of the procedures under this Decision no later than [5] years after the adoption of this Decision. Based on this review, Members may decide on whether to extend these procedures to other matters falling under the WTO Agreement or otherwise modify these procedures.

Annex 1

These procedures shall cover all NTBs affecting trade in goods and falling under the remit of the Council for Trade in Goods, except:

- Any measure regulated by the Agreement on Agriculture;
- Countervailing measures adopted pursuant to Part V of the Agreement on Subsidies and Countervailing Measures;
- Antidumping measures within the meaning of Article 1 of the Agreement on Implementation of Article VI of the GATT 1994; and
- Safeguard measures within the meaning of Article 1 of the Agreement on Safeguards.

Annex 2

In so far as the facilitator agreed upon by the parties or appointed by the Chairperson of the Council for Trade in Goods in accordance with paragraph 12 of this Decision is not the Chairperson of the relevant WTO Committee, or one of the Vice Chairpersons:

1. Facilitator shall be well-qualified governmental or non-governmental individuals.
 2. Facilitator shall serve in their individual capacity and not as government representatives, nor as representatives of any organization.
 3. Facilitator shall not be citizens of Members whose governments are parties to these procedures, unless the parties agree otherwise.
 4. Facilitator's expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with the criteria adopted for panellists under Article 8.11 of the DSU.
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