

COMMUNICATION FROM NEW ZEALAND

The following communication, dated 18 March 2005, from the Delegation of New Zealand, is being circulated in advance of the Negotiating Group meeting of 22-24 March.

PROPOSALS TO CLARIFY AND IMPROVE ARTICLES VIII AND X

I. INTRODUCTION

1. The submission outlines a group of "bite sized" proposals for specific clarifications or improvements to Articles VIII and X, with implications for Article V of GATT 1994. For convenience the proposals are arranged under the well-established WTO principles of transparency, due-process and minimising unnecessary restrictions on trade. The proposals seek to identify rules that would increase the predictability and certainty of international trade. These include discussion of Special and Differential treatment and Technical Assistance and Capacity Building considerations. New Zealand, however, considers that most of the following proposals are inherently likely to deliver greater benefits to developing country and small economy exporters than to developed country exporters.

II. TRANSPARENCY AND DUE-PROCESS

***Proposal:** That Members and traders be given the right to comment on proposed laws, regulations, judicial decisions and administrative rulings (as referred to in Article X) and have those comments taken into account.*

- **Improvement and clarification:** Article X should be improved to establish clearly that traders and other WTO Members have the right to comment on proposed customs rules, procedures, and policy with commercial effects. Currently Article X requires official publication of measures affecting imports, particularly customs measures, before they are enforced, and provides for appeal against and review of administration actions relating to customs matters. But the article makes no provision for those directly affected to comment on such proposed measures. This right to comment should also oblige the responsible authorities to take these comments into account, and either amend the proposed rule or procedure, or as the case may be, provide an explanation to traders and other WTO members as to why their comments have not been taken into account.
- **Experience:** Customs rules and procedures affect traders most directly; they also affect other WTO Members. New Zealand's domestic experience with implementing supply chain security, for example, has illustrated the importance of adequate consultation with traders to ensure that proposed systems minimize costs, avoid unnecessary restrictions on trade and are workable in practice, while also fulfilling any relevant security objectives. New Zealand has

also found it valuable to have such a dialogue with traders, including in providing explanations where their views or preferences have not been able to be taken into account.

- The Agreement on Technical Barriers to Trade (TBT Agreement) already provides a similar requirement that proposed regulations be published in advance and in a way that enables economic actors to become acquainted with the proposal, and establishes the right of other WTO Members to comment on proposed domestic regulations of other Members. It is anomalous that this right is already established under the WTO with regard to Members' domestic regulations, but does not apply to Members' border regulations that directly affect trade.
- Experience with the TBT Agreement also shows that even an obligation to "take into account" comments may in practice have little effect in ensuring that proposed measures are adjusted when they would have significant adverse effects on other Members or traders. At the same time, however, the right of Members to regulate must also be recognized and protected. This balance could perhaps best be addressed by a strong requirement that where a measure is not amended in accordance with comments (as is permitted under the TBT agreement), the responsible authorities should be required to justify the decision. This would go some way to addressing shortcomings that have been experienced in the application of the TBT Agreement, including insufficient protection given to exporting Members.
- **Special and Differential Treatment:** A requirement to allow for prior comment may lengthen the customs regulation process, and may increase administrative workloads for all Members which do not currently employ such procedures. On the other hand, the opportunity for consultation with those directly affected by proposed measures is likely to improve the quality and practicability of the resulting measures. If the proposed requirement would be inherently more burdensome for developing countries than for other Members, special and differential treatment to mitigate or manage such burdens would need to be considered.
- **Technical Assistance and Capacity Building:** Consideration of issues raised by traders or other Members could increase administrative workloads. A full consideration within government administrations of potential issues arising from proposed customs measures should be part of the normal process for sound development of government regulations in any event, but some Members may identify technical assistance and capacity building needs in this respect.

Proposal: That objective criteria be required to be used for tariff classification of goods.

- **Improvement and clarification:** GATT 1994 Articles VIII and X contain only limited disciplines about how products are classified at the border.¹ This proposal would improve and clarify those articles, particularly by requiring the use of objective tests, and by requiring Members to adopt the World Customs Organization's Convention on the Harmonized Commodity Description and Coding System ("the HS Convention"), as detailed below.
- **Experience:** The aim of introducing a greater degree of objectivity into customs classifications procedures would be to ensure that tariff classification decisions are not themselves used as disguised protection of domestic industries additional to the explicit protection provided through the tariff level set out in members' schedules and national tariffs. When customs officials decide how a good should be classified, the classification procedures

¹ The focus is on publication of decisions about the classification or valuation of products for customs purposes and appeal and review mechanisms with respect to customs decisions, and fees and formalities associated with border entry.

should not impose protection over and above that which is *objectively* necessary to implement the relevant level of tariff or other scheduled border protection.

- Our experience is that tariff classification decisions can have a significant effect on real market access. Based on this experience, we see real merit in introducing an explicit standard of objectivity into classification procedures. Where it is otherwise not possible to accurately determine the classification of a product, a test may be necessary. In such cases, an objective test should be used. These negotiations are an opportunity to establish criteria that classification decisions and any necessary tests should satisfy, such as objectivity, scientific basis, wide acceptance and impartiality.
- One element of ensuring that tariff classification decisions are made on an objective basis is to require Members to use the HS classification system when making tariff classification decisions. Under current GATT rules, there is no requirement to use any particular tariff classification system. Use of different classification systems by Members leads to uncertainty, and inconsistency in classification procedures and on occasion allows for the practice whereby importing countries sometimes manipulate tariff classification decisions to assign a higher tariff and/or different market access requirements to imported products. This could be readily redressed by requiring all Members to adopt the HS Convention. Although only two-thirds of WTO Members are Contracting Parties to the HS, this nomenclature is already applied to over 95 per cent of world trade. New Zealand sees benefit in requiring all WTO Members to commit to using this system of tariff classification.
- **Special and differential treatment/Technical assistance and capacity building:** Given the wide application of the HS Convention already, there may be only minimal special and differential treatment and technical assistance and capacity building required here for most Members. Prior to the introduction of the HS Convention, and ahead of each of the larger updates in 1996 and 2002 extensive TA was provided to Members. For those Members implementing for the first time, especially LDCs, some technical assistance may be needed.

III. MINIMIZING UNNECESSARY RESTRICTIONS ON TRADE

Proposal: That Members agree to more precise, operationally effective provisions on minimizing excessive documentation.

- **Improvement and clarification:** GATT Article VIII recognizes the need to reduce fees and formalities connected with importation and exportation to the minimum but neither requires it nor indicates how it could be done. Article VIII needs to be improved by providing clearer guidelines on how best to simplify and minimize these fees and formalities. A substantial part of any rules on trade facilitation should address the improvement and clarification of this Article.
- **Experience:** It is widely accepted that excessive documentation and complex fees and formalities at the border act as a disincentive to trade and also add costs and delays. Our experience is that current rules in GATT Article VIII do not provide sufficient guidance and encouragement to reduce these documentation requirements. In addition, there is often little understanding of the administrative framework operating within many members. Therefore, and to establish a baseline for this part of the negotiations, it would be useful for all Members to notify the documentation and entry systems which they currently implement or have in preparation. Based on this information, Members could then look at practical ways to minimize fees and formalities. We suggest that it might be appropriate to consider a menu of various steps to reduce excessive documentation requirements.

- **Special and differential treatment:** The idea of a menu of options is specifically designed to provide flexibility for members given the variation in their capacity to implement. In addition, developing country Members could be given additional time to implement such measures.
 - **Technical assistance and capacity building:** This proposal is designed to allow a better assessment of Members' current ability to implement new requirements for minimizing documentation. Depending on the detail of any menu of steps, in some cases technical assistance and capacity building may be necessary to help individual developing country Members to introduce such measures.
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