

Non-Tariff Barriers and **NAMA** Negotiations

**Developing India's
Negotiating Position**



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Foreword

As WTO negotiations reach a critical stage, there is immense pressure on countries to table improved proposals on mandates within the July Declaration. While Non-Agricultural Market Access (NAMA) negotiations are inching closer to a broad consensus on tariffs, Non-Tariff Barriers (NTBs) have not received adequate attention. Nevertheless, in times of declining tariffs, NTBs are expected to be more widely used tools for trade protectionism.

There is a dearth of proposals on tackling NTBs within WTO negotiations. This paper is a preliminary attempt towards addressing the void. The Hong Kong Series of Papers is Centad's initiative to provide well-researched perspectives on negotiating positions for South Asia in general, and India in particular.

This paper attempts to provide inputs for India's proposal to tackle NTBs in NAMA negotiations under the Negotiating Group on Market Access (NGMA). It does not intend to address all the NTBs faced by India, since this may result in diluting the depth of the paper. Instead it targets Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT), widely accepted as the most contentious NTBs faced by developing countries.

It studies the various modalities; sectoral, horizontal, plurilateral and multilateral, and discusses how proposals can be tabled using these modalities. The paper is not very optimistic on the sectoral approach, on account of the difficulties in persuading such a divergent set of countries to agree to reduce barriers on sectors of export interest to a few and suggests that India should engage in horizontal approaches to tackle NTBs. In addition it suggests using both Trade Facilitation (TF) and NAMA for disciplining NTBs arising from SPS and TBT.

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Abbreviations

CEC	:	Commission of European Communities
EU	:	European Union
GATT	:	General Agreement on Tariffs and Trade
ILAC	:	International Laboratory Accreditation Cooperation
ISO	:	International Organisation for Standardisation
OECD	:	Organisation for Economic Co-operation and Development
NAMA	:	Non-Agricultural Market Access
NGMA	:	Negotiating Group on Market Access
NGTF	:	Negotiating Group on Trade Facilitation
NTBs	:	Non-Tariff Barriers
PETA	:	People for Ethical Treatment of Animals
RTAs	:	Regional Trade Agreements
S&DT	:	Special and Differential Treatment
SPS	:	Sanitary and Phytosanitary Measures
TBT	:	Technical Barriers to Trade
TF	:	Trade Facilitation
UNCTAD	:	United Nations Conference on Trade and Development
WTO	:	World Trade Organisation

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Executive Summary

As tariffs are going down, most countries have concurrently used other forms of protection to restrict imports. Though there are rules and guidelines that govern the conditions under which trade restrictions may be applied, they often provide legal space/loopholes to engage in protectionism.

The paper embarks on a preliminary exercise to provide inputs for India's position on Non-Tariff Barriers (NTBs) within Non-Agricultural Market Access (NAMA). This paper has sought inputs from various reference points. These include India's submissions and notifications to Negotiating Group on Market Access (NGMA), non-Indian submissions and notifications to the NGMA, Committee reports, studies conducted on NTBs faced by India, corporate submissions, Non-governmental Organisation (NGO) submissions, work done by development organisations and their departments such as United Nations Conference on Trade and Development (UNCTAD), and a plethora of literature from reliable sources.

In the first section, this paper describes the current state of play in NTBs within NAMA negotiations and enumerates India's NTB concerns with the help of India's notifications submitted to the NGMA.

Section two discusses the broad macro-economic imperatives influencing India's negotiating position. NTBs are not restricted to a North-South debate, but are universal in nature. India and many emerging economies are competing with developed countries in value added products hence it would be short-sighted to restrict India's negotiating position to products of interest to developing countries. With the growing adoption of corporate social responsibility, voluntary initiatives are creating barriers; however development gains from such voluntary initiatives are immense, and India should work with them and not oppose them by including them in its proposals. Also, some

NTBs such as sourcing codes used by the private sector are simply beyond the scope of World Trade Organisation (WTO) jurisdiction and this should be respected.

Section three distils India's NTBs based on the discussions in Section two. This paper suggests that NTBs emerging out of non-governmental measures and trade facilitation should be left out of NAMA, since they can be better tackled elsewhere.

Subsequent to a brief discussion of the existing modalities for dealing with NTBs, negotiating positions are presented in three categories; sectoral or vertical, cross-cutting or horizontal and other key concerns.

The discussion on India's sectoral position, explains how India is in a favourable position on account of commonalities of interest with developing and developed countries. Hence India should focus on building alliances based on products of common interest across developing and developed countries. This will ensure that a critical mass is developed for moving forward. The paper is not very optimistic on the sectoral approach, on account of the difficulties in persuading such a divergent set of countries to agree to reduce barriers on sectors of export interest to a few.

India will have to engage in fair reciprocity, and avoid demands for tackling NTBs for products of developing countries alone. One approach is to table three sectors for vertical negotiations, of which two relate to export interest of developing countries and one sector of export interest of developed countries, and then jointly address NTBs in those three sectors. This will also ensure special and differential treatment.

On the horizontal approach, this paper narrates how current research emphasises Sanitary and Phytosanitary Barriers (SPS) and Technical Barriers to Trade (TBT) as main hurdles for developing countries including India. It draws attention to flexibilities in TBT and SPS agreements as the single most contentious NTB for developing countries. India's notifications reflect standards and certification

as priority concerns. India can propose the establishment of an Accreditation System for Certifying Agencies/Organisations for mutual recognition. This will tackle barriers such as excessive certification costs, testing facilities available in limited centres, non-recognition of certificates from international bodies and mandatory certification from developed country laboratories. In addition, India should focus on strengthening use of international standards, along with increasing the say of developing countries in framing international standards.

Special and differential treatment can be institutionalised by project based funding for developing quality control systems, constructing laboratories, constructing databases of procedures, setting residue monitoring systems, training of laboratory staff etc. To tackle equivalence related concerns, India can propose mandatory documentation of equivalence procedure.

Concern is also expressed on backdoor attempts to introduce disciplines in competition and investment and this should be resisted. In addition parallel structures to ensure that all NTBs are treated within NAMA negotiations, is unnecessary and will increase administrative inconvenience. Further there is no need to reopen SPS and TBT agreements, since this will open up a "Pandora's Box". NAMA and Trade Facilitation (TF) can together be used to discipline both these agreements.

Particular attention is given to India's proposals in the TF negotiations. From available information, it seems evident that India intends to use TF negotiations to address its major NTBs, namely procedural concerns in TBT and SPS. While this is a good move, one should be wary of over-burdening the TF agenda, and balance the distribution of NTBs within TF and NAMA.

As the framework text of the December Ministerial is developed, this paper will be revised to reflect current realities.

1. Introduction

Non-Tariff Barriers (NTBs) are to trade, what creative accounting is to balance sheets. As tariffs are going down, most countries have concurrently used other forms of protection to restrict imports. With the process of tariffication (conversion of NTBs such as quotas into tariffs) initiated by the World Trade Organisation (WTO), countries are using their creativity overtime to introduce new methods to protect domestic interests.

Health concerns can be raised to block entry. Custom procedures can be made more stringent. Country-specific standards can differ (in terms of stringency) for domestic and non-domestic products. Certification procedures can be made more cumbersome and expensive. All these forms of NTBs are difficult to identify and the loss (in terms of volume of exports and their value) caused by them, difficult to quantify.

Trade measures that cause increase in prices, prohibit the entry of some products, or increase custom procedures for imports and exports, are legal, if they are applied to address issues such as material damage to domestic industry, human and animal health, environmental protection, and national security. Though there are rules and guidelines that govern the conditions under which trade restrictions may be applied, they often provide legal space/loopholes for trade restrictions having protectionist intention.

1.1 NTBs in NAMA Negotiations: State of Play

NTBs are clearly the most twisted negotiating agenda within Non-Agricultural Market Access (NAMA) negotiations. While other elements, particularly tariff negotiations appear to have an agenda for agreement or disagreement, proposals on NTBs are clearly lacking in initiative and creativity.

WTO member countries, in the July Declaration, have prioritised further negotiations on NTBs as follows “We recognise 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, categorisation, 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.”¹

Earlier in 2002, the Chairman of the Negotiating Group on Market Access (NGMA) sent two letters dated 10 October 2002 and 27 November 2002 requesting members to notify NTBs which their exporters were facing in various markets. Subsequently the Negotiating Group in its meeting on July 2003, on NTBs, requested member countries to improve their submissions and establish a formal method for notifications. On November 28, 2003 the Secretariat sent out a format for categorisation of notifications, including a new inventory classification listed in Annexure 1.

Until October 2004, a substantial amount of identification and examination of NTBs was conducted.² The Secretariat played an important role in periodically reviewing the proposals submitted and developing a broad categorisation of NTBs and negotiation modalities.³ Some of these submissions are referred to in this paper.

The Chairman of the NGMA in his concluding remarks during the April 2005 Meeting, expressed “Everyone agreed that NTBs are very com-

¹ Framework for Establishing Modalities in Market Access for Non-Agricultural Products, Decision adopted by the General Council on 1 August 2004, WT/L/579, Annex B, para 14

² See TN/MA/W/25 and addenda, TN/MA/W/46 and addenda, for a compilation of notifications. Individual country notifications are also available in the TN/MA/W series of WTO documents

³ See TN/MA/9/Rev.1 WTO doc., for an overview of proposals submitted

plex. As a result, there was also a common view that it would be difficult to reach results on all of NTB issues by July and it would therefore be important to clarify how work will proceed in this area.” Subsequently the Chairman in his brief summary of the state of play, on 8 July 2005 stated “A considerable amount of time has been spent identifying and categorising the notified NTBs, and now the Negotiating Group has entered a phase of examination and negotiation of such NTBs. The modalities being used in the NTB negotiations are bilateral, vertical and horizontal. It is essential, particularly in respect of the last modality, to have specific written negotiating proposals tabled as early as possible. In addition, multilateral effect should be given to the results of NTB negotiations, which lend themselves to such an outcome, through *inter alia* incorporation of such results in Part III of the Schedule of Concessions.”⁴ Based on these guidelines this paper undertakes a preliminary exercise to develop India’s negotiating position.

1.2 India’s NTB Concerns

India is subject to NTBs in nearly all destination countries, more particularly in priority markets. Table 1 enumerates the percentage share of Indian exports subject to NTBs in EU, US and Japan.

However an exclusive focus on India’s leading markets and leading products would pave way for adverse selection, since one might neglect those products where current exports are low and future potential is high, or those products with low export share, on account of NTBs. Similarly, addressing NTBs in priority markets alone, may result in neglecting NTBs in markets where exports are low, possibly on account of such barriers.

⁴WTO negotiations produce general rules that apply to all members, and specific commitments made by individual member governments. The specific commitments are listed in documents called “schedules of concessions”. The schedules reflect the “concessions” a member has given in trade negotiations, such as in a multilateral trade round, bilateral or plurilateral negotiations outside a round, or membership negotiations. Each schedule consists of four parts, Part I consists of Most-favoured-nation or MFN concessions and maximum tariffs to goods from other WTO members, Part II consists of preferential concessions (tariffs relating to trade arrangements listed in GATT Article I), Part III consists of concessions on Non-Tariff Measures (NTMs) and Part IV contains specific commitments on domestic support and export subsidies on agricultural products.

Table 1. Hard-core NTBs Faced by India in Leading Markets in 1999⁵

Market	Percentage of Exports Subject to NTBs
EU	23.3
US	44.0
Japan	45.9

An in-depth investigation into NTBs faced by India is beyond the scope of this paper, and we shall rely on secondary literature for the same. These include studies, which have used exporter surveys and trade intelligence to build a comprehensive listing of an assortment of NTBs⁶ and also studies that look at NTBs faced by India's leading products in primary export markets.⁷

Since this paper envisages providing negotiation inputs on NTBs within NAMA Negotiations, a suitable proxy for India's concerns are India's notifications submitted to the NGMA.⁸ Is this approach appropriate? One might argue that the concerns of the exporters may not correlate with the concerns of the government, and hence the government's filtration mechanism, if any, may result in a poor construct of actual NTBs.

⁵ Rajesh Mehta, 'Non-Tariff Barriers Affecting India's Exports' RIS Discussion Paper 97, 2005

⁶ For example H A C Prasad (2004)

⁷ For example Rajesh Mehta (2005)

⁸ The Chairman of the Negotiating Group on Market Access sent two letters to member countries dated 10 October 2002 and 27 November 2002, requesting members to notify NTBs, which their exporters were facing in various markets. Pursuant to this request, India sent notifications TN/MA/W/25 dated 28 March 2003 and TN/MA/W/46/Add.4 dated 3 November 2004 to the WTO

To counter this argument one must understand the notification procedure. The Indian notifications in the WTO are based on a periodic study conducted by the Ministry of Commerce, Government of India titled "Non-Tariff Barriers Faced by India", last conducted in 2004. In addition the government collects data from export promotion boards, commercial intelligence agencies and by regular consultation with exporters. These notifications are simply a narration of NTBs faced by a country, necessary to identify and categorise NTBs, and are not negotiating positions. As a result there is little interest from the government to distil NTBs. This establishes a strong argument to use these notifications as a proxy for the actual NTBs faced by Indian exporters in destination countries.

Table 2. **Summary of India's Notifications**⁹

Ref. No.	Sector	NTBs
1	Marine Products	Standards are based on a higher level of sensitivity, which move up as technology improves and not on account of scientific evidence. E.g. residue monitoring of the antibiotic chloramphenicol (sometimes found in exports of shrimp, crab and crayfish from Asia) requires additional investment of INR 10 million (US\$ 1 = INR 45 approx.), for equipment.
2	Marine Products	'Non-validated', non-international testing methods are used in certain countries to detect cholera bacterium, causing export samples to fail tests.

Contd.

⁹ Compiled from TN/MA/W/10: India's Notification on 28 March 2003, TN/MA/W/46/Add.4: India's Notification on 3 November 2004, and Friends of the Earth International (2005) "Database of Selected Notifications of Non-Tariff Barriers in NAMA Negotiations of the WTO"

3	Marine Products	Some countries have specified limits for the bacterium <i>Vibrio parahaemolyticus</i> in fish products, which are to be cooked before consumption. No risk evaluation reports are provided for introducing these limits.
4	General	Standards are not available in English, use complicated language, which results in lack of transparency.
5	Hessian Bags	Standards for Hessian bags are technically non-achievable and not available in English. Also use of certain packaging material is specified without justification
6	Tyres	Testing/Conformity assessment for tyres costs US\$ 20,000 for the first time. In addition annual charges of US\$ 1100 have to be paid for revalidation, along with US\$ 600/day per inspector for conducting factory inspection.
7	General	High costs, limited testing locations, limited validity of certificates, non-recognition of certificates from select agencies, mandatory certification from host country laboratory and discriminatory Regional Trade Agreement (RTA) preferences are harming exports.
8	Marine Products	Some assessment units insist on flake ice machines to be installed in export houses, when same purpose can be achieved by cheaper means. These are safety management approach, which targets processes, and involves extraterritorial jurisdiction.

Contd.

9	General	Some countries do not enter into equivalence agreements even after receiving formal requests.
10	General	Some countries destroy consignments, instead of returning them to the exporter.
11	General	Buyers impose voluntary standards such as ISO 14000 and SA 8000 on their suppliers.
12	General	Importing countries impose high port fees, taxes, authentication fees and consulate procedures that add to costs and delays.
13	Textiles	Custom procedures and valuation rules are subjective. Duties are calculated on cost of cuts, make and trimming for domestic producers, while custom duty is levied on full cost of product, resulting in discrimination.
14	Textiles	Measuring standards are not harmonised. For example yarn is measured in square metre equivalent, while it is generally exported in kilograms.
15	General	Custom clearance is deliberately delayed to increase transaction costs and reduce competition for domestic players
16	General	Labelling procedures are cumbersome with extensive product/content description requirements.
17	Pharmaceuticals	Registration requirements are costly and time consuming.
18	General	Comprehensive Product Liability Insurance restrict export and marketing ability of developing countries

Contd.

19	General	Countries impose restriction on port of import by designating certain ports for particular goods.
20	Textiles	Some countries, particularly for fabrics made of wool, do not consider dyeing, printing and finishing operations as origin conferring, contrary to prevailing manufacturing practices.
21	Various Sectors	Valuation practices adopted by some RTAs members are not in conformity. In addition preferential conformity assessment for standards is available for RTA members, leading to restrictive impact on non-RTA members.
22	Leather Products	Campaigns are carried out to create public opinion as well as to force buyers to change their source of imports on non-trade-related grounds, e.g. ethical treatment to animals. These campaigns could have various motivations not necessarily based on truth.

Note: Notifications are a listing of NTBs of a country and are not negotiating proposals.

The above set of notifications deal with general NTBs of cross-cutting/horizontal nature and sectoral NTBs pertaining to five specific sectors. These sectors are marine products, tyres (automobile components), pharmaceuticals, leather products and textiles.

At this stage it would be simplistic and short-sighted to develop a negotiating position, without understanding the macro-environment, which governs India's trade priorities. In the subsequent section we shall try to understand the broad imperatives that play an influential role in determining India's negotiating position on NTBs.

2. Macro-economic Imperatives Influencing India's Negotiating Position

2.1 Universality of NTBs: Looking Beyond the North-South Debate

In the decade from 1991–2001, growth rate of India's exports was highest in Africa, at 16.9 percent, followed by the Americas at 14.4 percent.¹⁰ Several Southern economies like Brazil, China, Russia (part of the BRICS economies), South Africa and Nigeria are emerging as big markets. Studies predict that some of these economies will be bigger than all but one of the G6 economies.¹¹ Hence it is necessary to look at NTBs faced by Indian exporters in these emerging markets. The US and European Union, have developed bilateral mechanisms to tackle entry barriers in these markets, and aiming for multilateral solutions is one of the several policy options available to them. It is for countries like India, that multilateral solutions occupy centre-stage. However, India's NTB notifications do not adequately reflect the NTBs faced by India in other developing countries. The universality of NTBs should be kept in mind before tabling proposals.

2.2 Tackling Adverse Selection: Current Priorities vis-à-vis Future Potential

India's NTB negotiating agenda can result in adverse selection on two counts, namely

- focusing on those products which currently dominate the export basket, in terms of value and growth rate and
- focusing on those countries which are India's leading export destinations

In the first case, India may risk losing a negotiating platform to tackle NTBs in those products in which barriers are high and India

¹⁰ Ministry of Commerce and Industry, Government of India, 'Medium Term Export Strategy 2002–07' January 2002, 65

¹¹ See Dominic Wilson, Purushothaman Roopa 'Dreaming with BRICS: The Path to 2050' Global Economics Paper 99. Goldman Sachs, 2003

is unable to export optimally, e.g. pharmaceuticals where country specific standards and registration requirements impose high entry barriers. In the second case, India may risk losing a negotiating platform for tackling NTBs in those countries where export potential is inadequately tapped, e.g. China, allegedly on account of non-transparent rules.

India's Foreign Trade Policy 2004–09¹² envisages doubling India's foreign trade within five years. Several policy initiatives are announced to generate momentum towards this ambition including identification of priority sectors and priority products.

The Ministry of Commerce, Government of India classifies India's exports in four categories¹³ as steady growth items, which represent "cash cows" of India's exports; high growth, high value items, which represent "stars"; new high growth items, which are "question marks" since India is a new entrant in these markets with low market share and finally low value items, which will reduce in percentage terms, in their share of India's exports.

Chemicals, pharmaceuticals, IT components, engineering products, transport equipment, are few of our emerging strengths that have immense potential for value addition. However these markets are most restrictive, allegedly on account of direct competition with developed countries.

A cursory glance through India's notifications reflects a strong focus on primary products such as textiles, leather and marine products. There is no doubt that these products are very important, particularly on account of their employment potential, however India should also identify its current strengths that can be converted into future high-value exportables and attempt to mitigate NTBs in those products.

¹² Ministry of Commerce and Industry, Government of India, 'Foreign Trade Policy 2004–09'

¹³ Refer Annexure 2 for a classification of India's manufacturing exports based on growth characteristics

2.3 Respecting Scope of WTO Jurisdiction

Voluntary initiatives such as socially responsible procurement practises, are clearly beyond the scope of the WTO, since they are practices adopted by businesses and not by the government. In addition member countries can also do very little about campaigns that relate to socially relevant issues such as animal welfare. WTO agreements are designed to reduce trade barriers imposed by governments, and members cannot object to consumers freely exercising their choice in response to civil society campaigns. Thus India's negotiation position should respect the mandate under which the WTO operates, and avoid its enlargement.

2.4 Development Dimensions of NTBs: Extending Cooperation with Voluntary Initiatives

Multinational companies are increasingly adopting ethical sourcing codes to ensure that their suppliers are not being exploited. One of the primary reasons for these corporate social responsibility initiatives is the pressure applied by consumer organisations, human rights activists and non-governmental organisations (NGOs). Nike, Gap and Wal-Mart, are few of the well-known companies that were subject to brickbats on account of alleged sweatshop operations. The direct impact of such poor publicity is lower stock prices and poor sales volumes. Demonstrations, campaigns, protests and consumer boycotts are used as instruments to change their behaviour and improve their sourcing practises from developing countries.

In addition ethical consumerism is also a rising global trend. To cater to these consumers, companies are ensuring that suppliers comply with codes, which require adopting standards such as ISO 14000 and SA 8000.

Such non-governmental measures have led to development gains for countries like India, on account of improved social performance of exporting firms and resultant spill-over effects on the domestic industry. Technically India's classification of these voluntary initiatives as NTBs would be no different than preventing a consumer from exercising his right to choose products, or creating barriers for companies trying to sell socially responsible products.

In its notifications, India raised a concern that non-trade issues such as animal welfare were being used to change buyer behaviour. This particularly referred to the animal rights campaign initiated by People for Ethical Treatment of Animals (PETA) in August 2001, where it convinced over 40 developed country importers, including Gap, Mark & Spencer and Liz Clairborne to discontinue sourcing from India on account of mistreatment of animals. This forced the Central Government to issue a directive to all state governments to enact an Animal Protection Act. In addition the Council for Leather Exports, an apex trade promotion body instituted by the Government of India, pledged to work closely with PETA to improve treatment of animals. This was a very good step, and PETA withdrew its intensive campaign, which led to a normalising of the situation.

On another note, one might present the same argument of “development gains” for inclusion of environment and labour standards in the WTO. Hence at this point it is important to explicitly state that such an extension is not logical. This paper argues that excluding voluntary arrangements/non-governmental requirements from NTB negotiations in the WTO is useful for developing countries since:

- statutory obligations are not imposed
- additional costs of compliance are generally not borne by member countries
- penalties for non-compliance cannot be imposed on the member country (using the dispute settlement mechanism) and
- voluntary initiatives often involve investment by businesses as part of their social responsibility and ethical sourcing initiatives and also from funding agencies through their development assistance programs.

On the other hand, this paper is against the introduction of labour and environment i.e. non-trade issues within the WTO since it may lead to:

- imposition of statutory obligations on developing countries
- increase in costs for member countries for ensuring compliance
- penalties for member countries for non-compliance and
- extra-territorial jurisdiction

Though this paper suggests that the solution for working with non-governmental requirements is outside the WTO, it recognises the potential threat that may arise on account of stricter application of such private sector initiatives. Using the WTO as a platform for raising an alarm is timely, though no outcome may be expected.

3. India's Negotiating Position

The Secretariat's Note,¹⁴ on 29 October 2004, based on New Zealand's proposal¹⁵ classified NTBs in the following categories, to facilitate member responses on the scope of NTBs:

- 1) NTBs which relate to existing rules, which are not subject to negotiating mandate (e.g., customs valuation);
- 2) NTBs which relate to existing rules, which are subject to a negotiating mandate (e.g. subsidies)
- 3) NTBs which relate to other areas of the Doha Declaration (e.g., trade facilitation, services);
- 4) NTBs which relate to the work of the NGMA, and that might be dealt with either horizontally or sectorally; and
- 5) NTBs, which might best be addressed bilaterally through a request/offer procedure, either in the NGMA or elsewhere.

There is wide consensus that the NGMA should not take responsibilities that result in duplicating the work already in process in active areas of negotiation. These include categories two and three, i.e. NTBs, which are subject to a negotiation mandate, and NTBs, which relate to other areas of the Doha Declaration. The other three categories should be discussed within the NAMA Negotiations.

At this juncture we also need to address one more issue; India's position on the "referral approach". The referral approach implies adopting a clearing system, wherein residual and sectoral NTBs will be dealt

¹⁴ WTO Secretariat, 'Non-Tariff Barriers: Overview of Proposals Submitted', TN/MA/9/Rev.1, 29 October 2004

¹⁵ Submission by New Zealand 'Scope of the Negotiations on Non-Tariff Barriers', TN/MA/W/4, 31 July 2002

under NAMA, only if they cannot be referred elsewhere (e.g. TF) or to other committees which can be provided with a negotiating mandate such as Committee on Rules of Origin, Custom Valuation etc. Some NTBs, which can clearly be tackled in their respective mandates can be referred, for example customs related NTBs can be referred to the TF Committee. However the basis for referral to another committee needs to be enumerated. A one point guideline for referral could be that the negotiations handled by the committee to which the referral is made should be an integral part of the Doha Declaration.

Revisiting the above five categories, particularly category four and five, we realise that how to proceed with the modalities is a bigger question. These could be in the form of bilateral (through request and offer), plurilateral (group of countries coming together), multilateral, horizontal (cross-cutting) and sectoral (also called vertical). The following matrix will simplify our understanding of these modalities.

Table 3. **Interlinked Approaches to Modalities: A Hypothetical Example**

Participation Nature of NTB	Multilateral	Plurilateral
Vertical/Sectoral	All member countries decide to adopt Codex standards for marine products	Group of countries decide to adopt Codex standards for marine products
Cross-cutting/Horizontal	All member countries decide to adopt Codex standards, where they exist	Group of countries decide to adopt Codex Standards, where they exist.

Based on the guiding principles enumerated above, particularly in Section two, we try to develop a more focussed negotiating position, by way of elimination.

Table 4. **Distilling India's Notifications**

Notifications ¹⁶	Reason for Elimination
<p>11. Non-governmental requirements such as ISO 14000</p> <p>22. Animal Rights Campaigns</p>	<p>India's inclusion of these requirements is clearly for raising an alarm, regarding the growing use of these measures by private players, and the resultant need for some governance framework. However the scope of WTO jurisdiction prevents it from engaging in any action against voluntary initiatives, non-governmental requirements and public interest campaigns Hence India may not be able to include these NTBs in its proposal. Instead attempts should be made to see how these measures can be used to lock domestic policy reforms.</p>
<p>18. Product Liability Insurance Requirements</p>	<p>Auto majors such as Ford and General Motors insist on product liability insurance. The product liability insurance cover eases the acquisition and execution of export contracts as major automobile companies insist on such a cover if they want to offer large export contracts to the component manufacturers. Indian component makers face the risk of losing out big orders to other Asian countries like China and Thailand because of the lack of such an insurance cover. However insurance companies have already started offering such packages for component manufacturers.¹⁷ In addition, since these requirements are supplier driven and not government mandated, the jurisdiction question remains.</p>

Contd.

¹⁶ Refer Serial Numbers in Table 2, Column 1 for Reference Numbers used in this column

¹⁷ Adapted from Business Line, January 20, 2004, www.blonnet.com/2004/01/20/stories/2004012002680100.htm (visited on 19 June 2005)

<p>15. Delays in Custom Clearance</p> <p>19. Restrictions on Port of Import</p> <p>13. Onerous Valuation at Customs</p> <p>12. High Port Fees and Extensive Consular Formalities</p> <p>14. Measures and Standards not Harmonised at Customs</p> <p>10. Destruction of Consignments instead of providing an option of returning them.</p>	<p>The NTBs listed here are clearly linked to Trade Facilitation (TF). Since a TF Agreement is under negotiation within the Doha Mandate, these NTBs can be referred to the Negotiating Group on TF (NGTF). This is not to say that NTBs should be referred to other Negotiation Committees, as a matter of policy. A referral system can be adopted for negotiations that are currently in progress within the July Framework.</p>
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In the subsequent section, we shall classify India’s negotiating position based on:

- Sectoral/Vertical Proposals
- Cross-cutting/Horizontal Proposals
- Other Key Concerns within NTB Negotiations

3.1 Negotiating Inputs for Sectoral/Vertical Proposals

A sectoral approach is useful to tackle NTBs in priority sectors and increase market access in priority products such as marine foods, textiles, pharmaceuticals etc. In addition it aligns with the overall framework of “sequenced globalisation”. Most countries feel that the way ahead is “Sectoral”. The US sponsored two meetings on NTBs in the auto and footwear industries, Korea on the electronic industry, Canada on forestry products, New Zealand on wood products, and Switzerland on pharmaceuticals and chemicals. In July 2005, the US, New Zealand, Korea and select other members met informally to discuss

common sectoral positions in forest products (to harmonise building codes), electronics and automobiles.

The following table depicts sectoral commonalities by listing India’s sectoral notifications along with other countries that have submitted notifications in the same sector.

Table 5. Sectoral Commonalities: NTBs Submitted by India and other Countries on Similar Sectors¹⁸

Sectors	Developing Countries	Developed Countries
Marine Products/ Fish	China, Egypt, Thailand, Venezuela, Kenya, Philippines, Senegal, Korea, India	Australia, New Zealand, Norway,
Automobile Components	Argentina, India, Korea	Japan, US
Pharmaceuticals	Argentina, Uruguay, India, Bulgaria, Taiwan, Malaysia	Norway, Switzerland
Leather Products	Argentina, Korea, Philippines, Uruguay, China, Egypt, India	Australia
Textiles	Kenya, Mexico, Egypt, India	US

However apart from India’s submissions, there are several other products of India’s export interest for which India has not submitted a notification. A quick glance through India’s exports for the last two years assists us in identifying these products. In order to develop a list of India’s top three priority products below, we distil India’s exports based on the following criteria; non primary products, non-agricultural products, products with an export share of atleast one percent and products with a growth rate of over 15 percent.

¹⁸ Based on Database of Selected Notifications of NTBs in NAMA Negotiations of the WTO, Friends of the Earth International, 2005

**Table 6. Fast Growing High Value Export Categories¹⁹
(in million rupees)**

Products	04/02 – 03/03	04/03 – 03/04	Percent Growth	Weight ²⁰
Chemicals & Related Products	38030.65	44993.05	18.31	15.43
Engineering Goods	37211.02	47853.28	28.60	16.41
Electronic Goods	6265.07	7992.39	27.57	2.74

The following table lists the countries that have made notifications on the above sectors.

Table 7. NTB Notifications in Products of Export Interest to India, Submitted by Other Countries

Sectors	Developing Countries	Developed Countries
Chemicals	Argentina, Korea, Singapore, Bulgaria, China, Cuba, Egypt, Kenya, Malaysia Taiwan, Uruguay	US
Electronics and Electricals	Korea, Malaysia, Singapore, Bulgaria, China, Thailand,	Norway, US

Thirdly, there are other products that do not find a place in India's export basket; however there are a number of notifications on these products, hence there is scope for a sectoral initiative. The following table enumerates the same.

¹⁹ Extracted from 'Indian Export Statistics, April 03 – March 04' compiled by Economic Division, Ministry of Commerce based on DGCIS, provisional data

²⁰ Percentage share in total exports of India in the given period

Table 8. NTB Notifications Not of India’s Current Export Interest

Sectors	Developing Countries	Developed Countries
Environmental Goods	-	US
Wood Products	Egypt, Malaysia	New Zealand, US

Note: EU and Canada have also expressed keen interest in environmental goods at various fora.

The above analysis reveals that within the sectoral approach, there exists a degree of flexibility for India to agree or disagree for the sector to be tabled for negotiations.

India finds itself in a very favourable position as far as aligning with countries is concerned, unlike the case for agriculture. In agriculture, where India is unable to align with developed countries, in NAMA India can align with developing and developed countries alike.

For example, let us compare India’s export interests with reference to the NTBs notified by the US on 18th November 2004.²¹ The US notification deals with automobiles and components, pharmaceuticals and textiles, all of which are of export importance to India. In fact these sectors are emerging as “stars” in India’s export basket, constituting high value, high growth items. The Indian government classified all of these as “Priority Areas of Focus”.²² Similarly India’s interests also align with the NTBs notified by developing countries. Examples here include Thailand’s notification on seafood labelling²³ and Egypt’s notification on labelling and packing requirements on leather.²⁴

²¹ Notification by United States on ‘Non-Tariff Barriers’, TN/MA/W/46/Add.8/Rev.1, 18 November 2004

²² Refer Annexure 3 for sectors classified as primary focus sectors by the Ministry of Commerce and Industry, Government of India

²³ Notification by Thailand on ‘Dolphin Safe’ Labelling Requirements, TN/MA/W/25, 28 March 2003

²⁴ Notification by Egypt on ‘Excessive marking, labelling and packaging requirements on leather’, TN/MA/W/46, 26 November 2003

Developing Critical Mass in Sectoral Initiatives

Negotiation outcomes are, for the most part, governed by economic might. As enumerated below, India's share in world trade is much lower, compared to several other developing countries. This will pose a hurdle for tabling ambitious proposals.

Table 9. **Share of World Exports of Select Developing Countries**²⁵

	2002	2003	2004
India	0.8	0.8	0.8
China	5.1	5.9	6.2
Malaysia	1.5	1.3	1.4
All developing countries	37.9	38.7	40.2

In addition the scope for concentrating on select sectors of export interest is also limited. Moving ahead on sectoral proposals requires a critical mass, wherein countries which account for most of the world trade in a particular sector, can come together in favour of addressing NTBs in that sector.

The following is a list of non-agricultural and non-services products where India's share is more than one percent.

Table 10. **India's Share in World Exports of Select Commodities**²⁶

Product	Share of world exports in percent in 2002
Pearls, precious and semi-precious stones	13.6
Iron ore and concentrates	8.7

Contd.

²⁵ Government of India, 'Economic Survey 2005', <http://indiabudget.nic.in/es2004-05/chapt2005/chap64.pdf> (visited on 10 August 2005)

²⁶ *ibid*

Textile yarn, fabrics and madeups	3.6
Leather and leather manufactures	3.4
Fish and fish products	2.6
Metalliferous ores and metal scrap	2.5
Iron & Steel	1.6
Dyeing, tanning and colouring material	1.3
Organic chemicals	1.3

Precious stones seldom face any NTBs, on account of higher demand vis-à-vis supply. Similarly raw materials such as metal ores face easier entry procedures. India does not even account for a four percent market share in other products enumerated above. Hence, initiating any form of sectoral alliance will be a herculean task and developing a critical mass will require intense alliance-building.

Multilateral Sectoral Initiatives or Plurilateral?

The WTO has 148 members, each with distinct (though not mutually exclusive) export baskets. In general, no two countries share a similar export basket. In addition there is a history of past and current plurilateral agreements that were in place, primarily because GATT/WTO member countries, as a whole could not converge to provide undue advantages to any particular set of exporters. Hence, till date, no single sectoral initiative is multilateral in nature. A commonly used format in plurilateral initiatives is “zero for zero” initiatives, wherein countries, subsequent to developing a critical mass (based on their total share in that sector’s world trade) can establish a zero tariff structure amongst themselves. The most ambitious form of these initiatives exists in the form of the Information Technology Agreement. The following table enumerates the status of different plurilaterals of which only some are within the WTO, e.g. Civilian Aircraft.

Table 11. **Plurilateral Agreements in International Trade**²⁷

Sectoral Initiatives	Participation	Coverage	NTB Component
Civilian Aircraft	Initially 17 signatories (among which CEC and 9 EU members); currently 28	HS chapter 88	Yes, responsibility is delegated to TBT Committee
Chemicals	Initially 22 signatories (incl. CEC & EU 15); currently over 30	HS chapters 28–39, with few exceptions	No
Pharmaceutical Products	Initially 22 participants (incl. CEC & EU 15)	HS chapter 29 (Organic chemicals) and 30 (Pharmaceutical products)	No
Information Technology	Initially 29 signatories (incl. CEC & EU 15) — approx. 90 percent of world trade in covered products; currently 63 (incl. CEC and EU 25)	HS chapters 84, 85 and 90	Yes, addressed separately

Within NAMA negotiations too, plurilaterals are an option, particularly if NTBs and tariffs can be addressed in parallel. However this may lead to proliferation of plurilaterals within the WTO. Given the poor history of successful plurilateral agreements, this option also appears too ambi-

²⁷ OECD (2004) Ronald Steenblik, Presentation on 'Environmental Goods: Lessons from GATT and WTO Sectoral Initiatives' WTO Workshop on Environmental Goods, Geneva, 11 October 2004

tious. The alternate option is to look at bilateral trade relations for tackling NTBs at sectoral level. The scope for multilateral sectoral negotiations seems quite bleak, unless multiple sectors are tabled at the same time.

“Two for One” Initiative

Countries like India, which have interest in products of export interest for developing and developed countries, can develop middle-paths, to serve as second best options over no solution at all. For example, India can propose a “two for one” initiative wherein two vertical sectors of developing country interests such as textiles and seafood, and one sector of developed country interests such as pharmaceuticals can be combined to develop multilateral sectoral initiatives to tackle NTBs. To ensure that the initiative is not unbalanced, for example the value of a developed country’s exports of pharmaceuticals may exceed the combined developing country exports of textiles and seafood, it will be important to ensure that the value of the respective sectors and their breadth in the HS classification are not highly non-proportional.

3.2 Negotiating Inputs for Horizontal/Cross-cutting Proposals

A cursory review of the notifications submitted to the NGMA is adequate to conclude that most countries are of the opinion that sectoral NTBs are to be addressed in NAMA. NAMA clearly provides them with a platform to address NTBs that cannot be addressed elsewhere. However there is need to introduce new approaches to look at horizontal NTBs, an opinion also emphasised by the NGMA chair “The modalities being used in the NTB negotiations are bilateral, vertical and horizontal. It is essential, particularly in respect of the last modality, to have specific written negotiating proposals tabled as early as possible.”²⁸

Let us revisit India’s NTB notifications for developing a negotiating position for a horizontal proposal. India’s NTB notifications, particularly those remaining subsequent to our process of elimination, can

²⁸ WTO Secretariat, Chairman’s Commentary, ‘State of Play of the NAMA Negotiations’ Negotiating Group on Market Access, JOB(05)/147, 08 July 2005

be categorised as follows, based on the Inventory Classification sent by the WTO Secretariat to member countries²⁹.

Table 12. **India’s Horizontal NTB Notifications**

Classification as per the WTO Inventory	Description (Refer Annexure 1)
Part II, Section F	Discriminatory impact of rules of origin
Part III	Technical barriers to trade which include technical regulations, standards and testing procedures
Part IV	Sanitary and phytosanitary measures, which include chemical residue limits, certifications and conformity assessment
Part V, Section K	Requirements concerning marking, labelling and packaging
Part V, Section E	Discriminatory impact of bilaterals

The above five points, provide a crisp agenda on moving beyond the vertical approach to the horizontal.

According to an Organisation for Economic Co-operation and Development (OECD) Study of NTBs faced by developing countries,³⁰ “NTB categories with the highest incidence of notifications are Technical Barriers to Trade (TBTs, with 530 NTB entries, or almost half of the total), Customs and Administrative Procedures (380 entries), and Sanitary and Phytosanitary Measures (SPS, 137 entries). Amounting to less than five percent of total NTB entries were: quantitative restrictions, trade remedies, government participation in trade, charges on imports, as well as other barriers.” A comparison between India’s notifications and the OECD study reflects common concerns on TBT, SPS and custom related formalities as being the biggest hurdles.

²⁹ Refer Annexure 1 for the classification adopted in the WTO’s Inventory of Non-Tariff Measures

³⁰ OECD, ‘Analysis of Non-Tariff Barriers of Concern to Developing Countries’, Working Paper No. 16, TD/TC/WP(2004)47/FINAL, 3 June 2005

On the other hand, if one is to look at the disputes registered by developing countries, the statistics are different. According to the above study,³¹ NTBs that register the highest number of disputes presented by developing countries are trade remedies (43 cases), quantitative restrictions (18 cases), customs and administrative barriers (13 cases), and charges on imports (12 cases). The number of cases in the area of technical barriers to trade (which includes sanitary and phytosanitary barriers) is nine, and government participation in trade is seven. Thus one can assume that anti-dumping duties, countervailing duties and safeguard action can be reasonably subject to the dispute settlement mechanism, compared to SPS and TBT measures.

In addition there is a provision of notifications already at the disposal of WTO members in the form of Decision G/L/59³², which lays an obligation for member countries to notify certain import and export restrictions such as prohibitions, automatic licensing, non-automatic licensing, state trading enterprises, mixed regulations, minimum prices and voluntary export restrictions.³³

India should continue to support the use of dispute settlement as the primary means to address these NTBs and refrain from aligning with attempts to introduce stricter disciplines in anti-dumping measures, countervailing measures and safeguard measures. It is particularly important to take note of the fact that India is the largest user of anti-dumping duties in the WTO.

While trade remedial measures (anti-dumping, safeguards) and quantitative measures such as quotas are simpler to challenge in the WTO, it is more difficult to challenge agreements, which have inbuilt flexibilities, such as TBT and SPS. In addition leading studies on NTBs in India³⁴ hint towards WTO compliant NTBs being a greater cause

³¹ *ibid*

³² Decision G/L/59 of the CTG of 10 January 1996 on notification procedures for quantitative restrictions.

³³ See TN/MA/9/Rev.1, above n. 14, 23

of concern than non-compliant NTBs, where some form of redressal mechanism exists.

Hence the crux of horizontal negotiations should focus on disciplining technical barriers and phytosanitary barriers. India's proposal should address abuses of un-harnessed flexibilities in the TBT and SPS Agreements.

Standards

UNCTAD expressed its concern on standards related barriers in developed countries as follows "One approach would certainly call for refining the rules and disciplines in the TBT and SPS agreements to make them more precise (for example to clarify the key concept of "unnecessary obstacles to international trade" in the TBT agreement). The other approach would push towards negotiation and adoption of mutual recognition agreements (MRAs) between developed and developing countries, as is presently done amongst developed countries themselves."³⁵

Standards are undoubtedly an important barrier in increasing India's exports. Often international standards are not accepted and in other situations certification procedures in country of origin are not acceptable. In EU, sensitivity levels for testing chemical residues in marine products is very high and much above international standards. Electrical equipment standards used by the US, standards used by Japanese utility companies, requirement of a legal representative to ensure compliance in Brazil and a plethora of domestic standards in Mexico, that differ widely from international standards, are all examples of how standards are affecting India's exports.³⁶

³⁴ H A C Prasad "Market Access for Exports from India: Issues for Post Cancun WTO Negotiations in Industrial, Agricultural and Service Sectors" (Academy of Business Studies, 2004) ISBN 81-86234-28-4, 77

³⁵ UNCTAD, 'Methodologies, Classifications, Quantification and Development Impact of Non-Tariff Barriers', TD/B/COM.1/EM.27/2, 23 Jun 2005, 41

³⁶ See H A C Prasad, above n 34, 52-79

Certification

In Mexico, “Norm Mexico” certificate has to be obtained for every tyre and cannot be procured for the company as a whole. In Argentina there are cumbersome certification requirements in the electronic and textiles sector. In Bangladesh, certificates are given subsequent to long delays. In EU, lab tests required for certification are delayed. In the US, Department of Labour certification is necessary for industrial fasteners and equipments used in the workplace.³⁷

As per a study conducted by EU in 1996 costs of testing and certification can represent two to ten percent of overall product costs. The costs of certification in EC before single market accounted for three percent of the value of trade (OECD 1999) An OECD survey of 55 firms in US, Germany, Japan and UK found that conformity assessment and certification procedures imposed enormous costs on dairy products, automobile parts and telecommunications.

From the above discussion, certification related barriers could be summarised as follows:

- excessive certification costs
- testing facilities available in limited centres
- non-recognition of certificates from international bodies
- mandatory certification from developed country laboratories

Keeping in mind India’s notifications in Table 2, along with the above problems relating to standards and certification, India can table the following proposals

Establishing an Accreditation System for Certifying Agencies/Organisations

Tackling SPS and TBT related NTBs in NAMA negotiations require member countries to explore new disciplining mechanisms. One such approach is to establish an accreditation council for laboratories in different countries. This can be implemented on a sector-by-sector basis. This system will play the role of a lead agency for ensuring

³⁷ ibid

mutual acceptance/recognition amongst certifying and inspection agencies, which will require member countries to accept results of these laboratories/testing agencies. Arrangements similar to International Laboratory Accreditation Cooperation (ILAC) Arrangement³⁸ can be effectively formalised within the WTO framework.

Strengthening Use of International Standards

Member countries should strengthen the use of international standards where they exist. However one concern in formalising such a procedure of adopting international standards is that once such precedence is established, developed countries will attempt to raise international standards in standard setting bodies. These bodies are not as democratic as the WTO and developed countries virtually monopolise the standard setting process. Hence adopting international standards should move along with a greater say for developing countries in the establishment of these standards. India should oppose any attempt to use international standard setting bodies like Codex and ISO as backdoor route to strengthening standards. In addition India should emphasise on increasing developing country representation in standard setting bodies.

Technical Assistance and Capacity Building

Special and differential treatment forms an essential element of NAMA negotiations. Developing countries are in need of capacity building to improve domestic standards and certification systems. This can be ensured in the form of technical assistance programs. The Integrated Framework Diagnostic Trade Integration Studies³⁹, an integral part of the WTO Secretariat's mandate, can provide appropriate inputs for developing projects that cater to the following needs:

- developing quality control systems
- constructing laboratories
- constructing databases of procedures
- setting residue monitoring systems

³⁸ Refer Annexure 4 for details.

³⁹ Refer WTO Secretariat, 'Review of Standards Related Issues Identified in the Integrated Framework Diagnostic Trade Integration Studies', G/SPS/GEN/545, 28 February 2005

- training of laboratory staff
- developing MIS formats for accreditation purposes

Standards in English language

India can table a proposal that makes it mandatory for all standards to be translated in English and publicly available.

Differential Pricing Practises

Differential rates can be charged by national certifying authorities to developed and developing countries. This will reduce the cost burden on developing countries, for example 50 percent reduction in certification charges for developing countries.

Promoting Self-Certification

India should aim for an agreement on acceptance of self-certification by national authorities. This will reduce the costs of certification substantially. The argument that this will reduce compliance can be refuted, since customs procedures at port of destination exist to ensure that products with false/incorrect claims are denied access.

Mandatory Documentation of Equivalence Procedure

Equivalence agreements are a reliable solution to tackle select SPS and TBT related barriers. India should propose to make it mandatory for all member countries to document procedures required for third countries to request/offer and engage in equivalence agreements, including the time-line and milestones. Currently equivalence is being pursued bilaterally and there is no systematised methodology, since no country has a clear documented procedure on equivalence agreements. Some of the key equivalence agreements that India can pursue actively relate to products of animal origin (veterinary equivalence), electricals and electronics, high-end technology products and ecolabels.

Adopting Codex Consignment Rejection Guideline

Codex developed a guideline for the exchange of information between countries on rejection of imported foods⁴⁰ wherein the

⁴⁰ Codex Alimentarius, 'Guidelines for the Exchange of Information between Countries on Rejections of Imported Foods', CAC/GL-25-97, (1997)

standard disciplines the procedure of action, subsequent to refusing entry to a consignment. This includes disciplining norms for destruction, retesting, re-export to third countries and returning to country of origin. Adoption of this standard will ensure that authorities in certain importing countries will not destroy damaged consignment instead of returning them to the exporting country upon request of the importer/exporter.

Box. 1 Betting on Trade Facilitation: A Balancing Act

India's positions in TF negotiations make for interesting reading. In the NGTF meeting on 1–2 May 2005, the summary read "India supported the harmonisation and standardisation of document formats proposed by Korea In addition India said that it would be useful if data harmonisation was not restricted only for customs requirements but also extended to meet the requirements of other government agencies."⁴¹

Section four of the proposal⁴² tabled by India and the United States to establish a multilateral mechanism for the exchange and handling of information between members, classifies required information in two categories; the first is a defined universe of trade transaction information consisting of the "documentation" or data elements that relate to the movement of goods across a border – i.e., the specific information normally collected in association with the importation and exportation of goods.⁴³ (This is of less relevance to NTBs under NAMA)

The description of the second category reads "the second category refers to information sought at a more advanced procedural or investigatory stage – generally presenting case-specific needs and sensitivities that require individual handling. Both information

Contd.

⁴¹ WTO Secretariat, Summary Minutes of the Meeting on 2–3 May 2005, Negotiating Group on Trade Facilitation, TN/TF/M/5, 10 June 2005, 52

⁴² Communication from India and the United States, Negotiating Group on Trade Facilitation TN/TF/W/57, 22 July 2005

⁴³ *ibid*

categories described can be the subject of various cooperation efforts, and as such, are matters that can be addressed as the negotiations proceed. However, this proposal deals with the first category of trade transaction information and sets out a proposed path to establishing a mechanism for exchange of information between members. A future submission will set out a proposed path for addressing the second category of information.”⁴⁴

At this stage one can only speculate on what India and US would propose towards addressing the second category of information particularly relating to “information sought at a more advanced procedural or investigatory stage.” Both these interventions hint towards India using TF negotiations to address procedural concerns arising out of TBT and SPS.

On one hand India is identifying the TF negotiations as an entry-point on NTBs, on the other hand, developing countries fear that broadening of the TF agenda will result in an increase in their costs and obligations. However an alternate thinking exists. Firstly, TF is an issue tabled for negotiation by developed countries. Secondly, the TF Annexure in the July Declaration is emphatic on technical assistance, capacity building and special and differential treatment (S&DT) for developing countries.⁴⁵ Hence India can table procedural problems in SPS and TBT within TF negotiations, ensuring that technical assistance, cost-sharing arrangements and S&DT in TF assists in minimising the impact on India’s own commitments under the agreement.

Technical assistance, a more concrete form of S&DT does not appear in the NAMA text. Further, NTBs under NAMA only address non-agricultural products, while NTBs under TF have the potential of addressing agricultural NTBs; given that NTBs on food products are a big hurdle for India. Thus TF appears to be a platform where developing countries

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⁴⁴ *ibid*

⁴⁵ Decision Adopted by the General Council on 1 August 2004, Annex D, WT/L/579, 2 August 2004

will be able to discipline SPS and TBT at a lesser price, since one might expect developed countries to ask for a higher degree of reciprocity in NAMA.

Nevertheless one should exercise this option with caution, to avoid over-burdening the TF negotiations. A middle-ground is in using TF and NAMA negotiating groups in parallel, and dividing NTBs within the two negotiations. For example amongst the NTBs tabled in Section 3.2, one could transfer the following proposals to TF:

- Establishing an Accreditation System for Certifying Agencies/Organisations
- Technical Assistance and Capacity Building
- Standards in English Language
- Differential Pricing Practises
- Promoting Self-Certification
- Mandatory Documentation of Equivalence Procedure
- Adopting Codex Consignment Rejection Guideline

This may imply that India may address residual NTBs in NAMA negotiations. This is not a major concern. After all, it is the end and not the means, a generally acceptable rule; particularly sacrosanct as far as WTO negotiations are concerned.

3.3 Other Key Concerns within NTB Negotiations

Above we have tried to develop a negotiating position for India's most important horizontal concerns namely SPS and TBT. In addition the following are issues of concern in NTB negotiations:

Backdoor Attempts to Introduce Singapore Issues

There have been attempts to introduce disciplines in investment and competition, via NTBs in NAMA, within the WTO framework. For example, the notification by United States⁴⁶ on 18 November 2004, includes the following barriers:

⁴⁶ Notification by United States, above n. 21

- Foreign equity restrictions that restrict or manipulate investment in automotive production (not currently covered by WTO provisions since it is an investment issue)
- Distribution channels are not open to imported products (not currently covered by WTO provisions, since it is a competition issue)

India should oppose such back-door approaches to reintroduce the Singapore issues, within the negotiation mandate.

Reopening SPS and TBT Agreements: A Pandora's Box

The SPS and TBT Agreements have clearly done less to discipline international trade, than what was envisaged. While SPS primarily deals with food products, its relevance in NAMA is particularly for fish and fish products. On the other hand TBT covers the complete gamut of non-agricultural products. The SPS and TBT agreements have been unable to deliver effectively on most of their intended outcomes, namely:

- harmonisation; multiple standards continue to exist
- greater use of international standards; countries continue to adopt standards, higher than international standards
- equivalence; equivalence procedures are not documented and are mostly signed between developed countries
- risk assessment based on scientific evidence; standards continue to be increased based on advances in scientific equipments
- transparency; third countries are seldom consulted while standards are set. Further standards are upgraded using addendums, which do not provide the mandated time for compliance.

However, addressing SPS and TBT concerns by reopening the SPS and TBT agreements is outside the scope of the Doha mandate. In addition exploring means to re-open the same, is like opening a "Pandora's Box". With European Union's interest in strengthening the "precautionary principle" one might expect a further dilution of developing country interests. Hence SPS and TBT agreements do not serve as useful entry points. The essence of the argument is that SPS and TBT agreements need not be fidgeted with. There is need to discipline

SPS and TBT agreements and strengthen the above enumerated principles; however this can also be done with the help of NAMA and TF negotiations.

Parallelism

“Parallelism” is a commonly used term in NTB negotiations under NAMA.⁴⁷ It appears to have caught on as a fashion statement. However it simply means that NTBs should be addressed in parallel to reduction in tariffs, as NTBs in many occasions have nullified existing market opportunities. In addition it states that in case it is convenient to treat a set of NTBs in another negotiating committee, the central control and monitoring should still lie with the NAMA Group.

Consider the policy suggestion “The NAMA group will be responsible for finalising the decisions based on the negotiations in various WTO bodies”⁴⁸ Adopting this policy raises several concerns. Firstly this will result in formalising a structure of parallel hierarchies in the WTO negotiating committees and thwart their independence. Secondly it will open a second window of entry into any negotiation. For example, consider an NTB in the form of custom procedures, which can be effectively tackled in TF Negotiations. However adopting parallelism would mean that NTBs in TF negotiations will be subject to approval of or control by the NGMA. This is simply an increase in administrative inconvenience. In addition it will give rise to a flurry of legal interpretation on transferability. Further NTBs are too complicated to be correlated to tariff reduction. Thus functional parallelism seems to be an impossibility.

⁴⁷ Bhagirath L Das “The Current negotiations in the WTO: Options, Opportunities and Risks for Developing Countries”, Zed Books (2005), ISBN: 1 84277 712 2 46, 44–45

⁴⁸ *ibid*

4. Concluding Remarks

This paper has discussed different proposals that can be tabled by India in NTB negotiations under NAMA. An attempt has been made to tackle fewer issues, to avoid overburdening the agenda. In addition other important themes, namely discriminatory impacts of regional trade agreements in general and rules of origin in particular, are untouched.

The discussion on India's sectoral position, explained how India is in a favourable position on account of commonalities of interest with developing and developed countries. Hence India should focus on building alliances based on products of common interest across developing and developed countries to ensure that a critical mass is developed to move forward.

India will have to engage in fair reciprocity, and avoid demands for tackling NTBs for products of developing countries alone. One approach is to table three sectors for vertical negotiations, of which two relate to export interest of developing countries and one sector of export interest of developed countries, and then jointly address NTBs in those three sectors. This will also ensure special and differential treatment.

In the horizontal approach, this paper singled out flexibilities in TBT and SPS agreements as the single most contentious NTB for developing countries. Focussing on standards and certification, it suggests the following proposals:

- establishing an accreditation system for certifying agencies/organisations
- strengthening use of international standards, along with increased representation of developing countries in standard setting bodies
- technical assistance and capacity building for developing countries
- mandatory documentation of equivalence procedure and
- adopting Codex consignment rejection guidelines.
- standards in English language
- agreement on self certification
- differential pricing

In addition the paper expressed concern on backdoor attempts to introduce Singapore issues, namely competition and investment. On parallelism the paper suggested that though NTBs should be dealt along with reduction in tariffs, trying to establish a control structure of parallel hierarchies in the WTO Negotiating Committees will be harmful and should be avoided. On reopening the SPS and TBT agreement, this paper suggested a strong negative. On using TF as an entry point for tackling NTBs, this paper welcomed the move, but expressed concern on overburdening the TF agenda, without adequately understanding the consequences.

Finally, this is a preliminary attempt at developing India's position. At this juncture it is important to realise that there is no publicly available document that engages in a serious discussion on India's negotiating position on NTBs. As the framework text of the Hong Kong Ministerial 2005 is developed, this paper will be revised to reflect current realities.

Annexure 1

Classification of NTBs in the WTO's Inventory of Non-Tariff Measures⁴⁹

Parts & Sections	Description
Part I	Government Participation in Trade and Restrictive Practices Tolerated by Governments
A	Government aids, including subsidies and tax benefits
B	Countervailing duties
C	Government procurement
D	Restrictive practices tolerated by governments
E	State trading, government monopoly practices, etc.
Part II	Customs and Administrative Entry Procedures
A	Anti-dumping duties
B	Customs valuation
C	Customs classification
D	Consular formalities and documentation
E	Samples
F	Rules of origin
G	Customs formalities
H	Import licensing
I	Preshipment inspection
Part III	Technical Barriers to Trade
A	General
B	Technical regulations and standards
C	Testing and certification arrangements
Part IV	Sanitary and Phytosanitary Measures
A	General
B	SPS measures including chemical residue limits, disease freedom, specified product treatment, etc.
C	Testing, certification and other conformity assessment

Contd.

⁴⁹ WTO Secretariat, 'Table of Contents of the Inventory of Non-Tariff Measures' Negotiating Group on Market Access, TN/MA/S/5/Rev.1, 28 November 2003

Parts & Sections	Description
Part V A B C D E F G H I J K L	Specific Limitations Quantitative restrictions Embargoes and other restrictions of similar effect Screen-time quotas and other mixing regulations Exchange controls Discrimination resulting from bilateral agreements Discriminatory sourcing Export restraints Measures to regulate domestic prices Tariff quotas Export taxes Requirements concerning marking, labelling and packaging Others
Part VI A B C D E	Charges on Imports Prior import deposits Surcharges, port taxes, statistical taxes, etc. Discriminatory film taxes, use taxes, etc. Discriminatory credit restrictions Border tax adjustments
Part VII A B C D E	Other Intellectual property issues Safeguard measures, emergency actions Distribution constraints Business practices or restrictions in the market Other

Annexure 2

Growth Matrix of India's Manufacturing Exports⁵⁰

An analysis of growth rates within the manufactured goods group shows that most of the items in the manufacturing group have shown an increasing trend throughout the decade and can be grouped into four sub-groups as given below:

High growth, high value items: The high value, high growth items are gems and jewellery, manufactures of metals, drugs, chemicals and textiles. Gems and jewellery improved its export value from US\$ 2.75 billion to US\$ 7.4 billion over the decade. Moving from an insignificant position in the 80s, it has become the second most important constituent with a share of 17 percent in 2000–01. Drugs, pharma and chemicals have increased from US\$ 0.6 billion in 1991–92 to US\$ 1.91 billion in 2000–01. Manufactures of metals have increased from US\$ 0.5 billion in 1991–92 to US\$ 1.6 billion in 2000–01. Machinery & instruments have increased from US\$ 0.6 billion in 1991–92 to US\$ 1.6 billion in 2000–01. Transport equipments have increased from US\$ 0.5 billion in 1991–92 to US\$ 0.98 billion in 2000–01. Textiles comprising readymade garments and yarn together have increased from US\$ 4.03 billion to US\$ 10.4 billion in 2000–01. A comparison of the export baskets reveals that textiles improved its share from 22.6 percent in 1991–92 to 24.4 percent in 2000–01.

Fast growing, lower value items: Inorganic chemicals & agrochemicals and handicrafts including handmade carpets comprise about 1.7 percent each of total exports and have clocked a growth of 14 percent and 12 percent respectively. Other items that have grown impressively are rubber manufactured products, paper/wood products and glass/glassware/ceramics.

Steady growth items: Electronic goods, machinery and instruments, dyes intermediates and coal tar chemicals and transport equipment are the other items whose export value increased.

Low growth items: The commodity group that has shown a low growth in exports is leather & manufactures. Its share of the export basket has fallen from a peak of seven percent in 1991–92 to 4.38 percent in 2000–01.

⁵⁰ Government of India, Ministry of Commerce and Industry, 'Medium Term Export Strategy 2002–07' January 2002, 21

Annexure 3

Priority Sectors of Focus

The six priority sectors of focus identified by the Ministry of Commerce⁵¹ in the Medium Term Export Strategy 2002–07 are as follows:

1. Engineering/Electrical/Electronics and Allied
 - (i) Engineering (in general)
 - (ii) Auto Sector
 - (iii) Project Exports
 - (iv) Electronics Hardware and other IT Related Sector
 - (v) Instruments and Repaired Products
2. Textiles
3. Gems and Jewellery
4. Chemicals and Allied including Cement
5. Agriculture and Allied (including plantations & marine products).
 - (i) Agriculture and Allied
 - (ii) Plantations and Related Items (including tea, rubber, coffee, tobacco, spices, cashew)
 - (iii) Marine Products
6. Leather and Footwear

⁵¹ Government of India, above n 50, 49

Annexure 4

Multilateral Cooperation on Laboratory Accreditation: ILAC Case Study⁵²

The International Laboratory Accreditation Cooperation (ILAC) first started as a conference in 1978 with the aim of developing international cooperation for facilitating trade by promotion of the acceptance of accredited **testing and calibration** results. In 1996, ILAC became a formal cooperation with a charter to establish a network of mutual recognition agreements among accreditation bodies that would fulfil this aim. The "ILAC Arrangement" provides significant technical underpinning to international trade. The key to the Arrangement is developing a global network of accredited testing and calibration laboratories that are assessed and recognised as being competent by ILAC Arrangement signatory accreditation bodies. The signatories have, in turn, been peer-reviewed and shown to meet ILAC's criteria for competence. Now that the ILAC Arrangement is in place, governments can take advantage of it to further develop or enhance trade agreements. The ultimate aim is increased use and acceptance by industry as well as government of the results from accredited laboratories, including results from laboratories in other countries. In this way, the free-trade goal of "a product tested once and accepted everywhere" can be realised.

The ILAC Arrangement, entered into effect on 31 January 2001, provides technical underpinning to international trade by promoting cross-border stakeholder confidence and acceptance of accredited laboratory data. Until the advent of the ILAC Arrangement, there had been no multi-lateral mutual recognition agreement in laboratory accreditation. This has been a hindrance for some types of international trade, particularly those products which have had to undergo re-testing or re-calibration upon entry to importing countries. The ILAC Arrangement should facilitate this trade. The aim of the ILAC Arrangement is to develop a global network of accredited testing, calibration and inspection facilities that can be relied on to provide accurate data. The ILAC arrangement is signed by national bodies of 39 countries.

⁵² 'The ILAC Mutual Recognition Arrangement', <http://www.ilac.org/downloads/Arrangement.pdf> (visited on 19 August 2005)

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