

COMMENTS TO THE CHAIRMAN'S DRAFT NAMA MODALITIES

SYNOPSIS

This note contains preliminary comments on the Draft NAMA Modalities submitted by the Chairman of the WTO Negotiating Group on Market Access (Job (07)/126). While the text will need to be discussed, amended and, if agreed, adopted at a later stage, it constitutes a capital document as it will constitute the yardstick against which positions will be assessed. This note reviews each of the sections of the modalities and comments on their general implications for developing countries.

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I. INTRODUCTION

1. On 17 July 2007, the Chairmen of WTO NAMA and WTO Agricultural negotiations have released their respective draft modalities texts¹ which summarise discussions in both negotiating groups at this stage and propose draft modalities to guide the continuation – and conclusion – of both negotiations.

2. From the outset, it must be recalled that both draft modalities papers are not final and that they are proposed to advance discussions with a view of finalising modalities. It is proposed that preliminary discussions be held on these texts before the end of July, before a more thorough examination takes place from September 2007.

3. Preliminary reactions to the NAMA draft text, by the G4 delegations, were generally cautious, but positive, reflecting a desire to avoid further weakening the fragile negotiating process.² Informal reactions to the text, however, from almost all developing country delegations were generally very negative, describing it as flawed and saying that there could be no consensus around it. These reactions contrast with the cautious but positive reactions that delegations made to the text in Agriculture.

4. However, even if both the Agriculture and NAMA texts are open for improvements and even if several aspects of the modalities still require further discussions before they can be translated into legal language, both documents are already crucially important documents. They constitute, indeed, the closest reflection of what the core of the Doha agenda – Pascal Lamy's triangle of issues³ – could look like and can thus be already used for an early assessment, at least partial, of the results of the Round for individual delegations. Both texts will, in addition, provide yardsticks to assess new proposals and suggestions made later in the negotiations.

5. This note comments on the various sections of the NAMA Draft Modalities text and reviews the proposed modalities in light of their purported implications for developing countries.

¹ "NAMA Draft Modalities" (Job (07)/126) and "Draft Modalities for Agriculture" (Job (07)/128).

² "OMC apresenta nova proposta para não martelar o último prego no caixão de Doha" FIESP, 18 July 2007, available at: <http://www.fiesp.com.br/agencianoticias/2007/07/18/omc-novaproposta-doha.ntc>. "EU reaction to WTO Chairman's texts on Agriculture and NAMA", EC, 17 July 2007, available at: http://ec.europa.eu/trade/issues/newround/doha_da/pr170707_en.htm. "India guarded over fresh WTO draft", Financial Express, 21 July 2007 Available at: <http://www.financialexpress.com/news/India-guarded-over-fresh-WTO-draft/205959/>

³ The triangle refers to the modalities governing negotiations with respect to market access for industrial products, market access for agricultural products and agricultural domestic subsidies.

II. GENERAL COMMENTS ON THE TEXT

6. There are several aspects of the text - as a whole as opposed to the specific modalities proposed therein - that deserve few comments.

7. First, regarding the structure of the text, it is worth noting that it contains two major parts: the first is the Chairman's introduction containing both general comments on the purpose of the text as well as detailed comments on some of the specific provisions proposed for modalities. The second is the actual draft modalities text, drafted in legal language and including annexes and references to relevant legal instruments which supplement the modalities.

8. Second, regarding the purpose of the text, the Chairman mentions that goal of the text is to foster compromise, that is, to prompt delegations to change or adjust their positions to find convergence around a middle ground⁴. Whereas in the Draft Modalities for Agriculture, the Chairman clearly states that the text is open for debate⁵, in NAMA, the focus is rather on proposing language that is as close to final as possible. In fact the Chairman recognises that his text is likely not to satisfy many delegations, but he clarifies that his interpretation of his role as Chairman required him to propose "*specific outcomes*" and not a repetition of "*everyone's position*".

9. This could be paradoxical as, on the one hand, the Chairman wishes to prompt delegations to negotiate, but, on the other hand, he reduces or eliminates the space delegations have by eliminating negotiating options and proposing a final outcome.

10. In fact, a distinct feature of the text is that it does not propose alternatives, but rather one solution for each negotiating heading. This will require delegations to propose alternative specific outcomes when commenting on the proposed modalities (rather than simply voicing dissatisfaction with aspects thereof). This will require great efforts from delegations, both in terms of identifying their negotiating red lines, coordinating positions within groups, and translating collective views in operational legal language.

11. On the way forward, it is understood, of course - even if not explicitly stated in the text - that the text does not amount to final modalities and can be modified by delegations when detailed discussions start in September 2007. As is usual now, the process in NAMA will mirror (and in fact be contingent upon) the process in WTO agricultural negotiations.

⁴ NAMA Chairman Amb. Stephenson of Canada mentioned that WTO members "*will have to change [their] positions to reach an agreement*" and that he aims at "*challenging all to compromise*".

⁵ Agriculture Chairman Amb. Falconer of New Zealand mentions that the Draft Modalities for Agriculture "*is there to be worked on by*" all Members and that compromise "*should take as long as it takes*".

12. In addition the draft modalities text seems to be intended for ministers⁶. This could suggest that the proposed modalities or a modified version thereof will be adopted by ministers either at a ministerial meeting of the entire WTO membership or by some ministers representing key WTO members in a process similar to that which led to the adoption of the 2004 NAMA Framework modalities. The second scenario will require delegations to be vigilant and ensure their ministers are constantly briefed about the negotiating options and possibly available to travel to Geneva if needed. Adoption of modalities is rumoured to be scheduled for September or October 2007.

13. Third, and as a consequence of the previous point, the text contains specific and detailed outcomes for most areas of NAMA negotiations. Few areas were left incomplete, and in such instances, the text instructs Members, sometimes with timelines, to intensify their negotiations to reach modalities language. Issues for which the text does not propose final language include:⁷

- a. Sectoral negotiations;
- b. Non-tariff barriers;
- c. Transparency in the identification of lines to be exempted from the flexibilities in the case of countries applying the Swiss formula;
- d. Improvements to the Rules of Origin in preferential trade schemes benefiting Least Developed Countries; and,
- e. Environmental Goods.

14. The level of detail and comprehensiveness of the Chair's NAMA text also contrasts with the structure of the Draft Modalities Text for Agriculture, in which several areas – often of critical importance for developing countries – were left open for further discussions⁸, requiring either a longer timeframe for the conclusion of full modalities or the adoption of partial modalities only. By contrast, the NAMA draft text can be seen as containing full – and not partial – modalities: all the core areas of negotiations, including most areas of interest to developing countries were covered. As a result, the NAMA text is, technically, almost ready to be adopted, subject of course to modifications delegations may want to introduce therein to make it a consensual text.

15. Regarding its contents and level of ambition, the Chairman's text builds on extremely polarised positions, trying to synthesise them in a single approach (not in options). Building on the 2004 Framework, the text comprises multiple structures, or a differentiation of concessions for different country groups.

⁶ Ministers are addressed in the Chairman's observations (first section), for instance: *"I would strongly recommend to Ministers that..."* or *"Where additional flexibility is judged necessary by Ministers..."*.

⁷ Please refer to the sections below for a detailed analysis of the proposed modalities in these areas.

⁸ Under the Agricultural market access pillar alone, the following areas were left for further work from September 2007: work in indicators for the selection of special products, details of the special safeguard mechanism, modalities for the monitoring and surveillance mechanism, preference erosion, modalities for tariff escalation, tropical and diversification products, and commodities.

However, the solutions proposed are clearly tilted in favour of greater market access, a pattern that the Chairman acknowledges explicitly, since he has “*not shied from proposing real contributions*”. In fact, delegations who had hoped to adopt a flexible tariff reduction approach will certainly have greater difficulties in accepting the draft modalities than those delegations who sought more drastic industrial liberalisation.

16. This raises three main questions as far as the process of consensus building is concerned:

- a. First, if diverging interests pull modalities in opposing directions, that is, towards a more flexible or less flexible approach to tariff reductions, what constitutes the middle ground for agreement? Not the mathematical middle ground, as the Chairman says⁹, but rather a fair ground? Should all the membership move at the pace of the fastest members or should it adopt the pace of the most vulnerable members? The Chairman’s view is that “*adjusting the rules in the direction of the lowest common denominator [...] might deliver a result that is comfortable to all, but no worth having*”.
- b. Second, the draft modalities text builds on the “*almost unanimously held*” principle that all countries must contribute to the negotiations. However, who should assess the extent of contribution of each country? Should the demandeur of an issue determine what should be a minimum contribution or should rather that threshold be identified by the countries who will ultimately implement concessions? The draft modalities text often favours the demandeurs.
- c. Third, the text reflects the view that there should be a hierarchy in the contribution that different members or groups of members make in the negotiations. This may make sense from the negotiating point of view, since a scale of contributions can accommodate certain sensitivities and facilitate convergence towards common language. However, the concept of hierarchy and its application to NAMA has no more than a weak correlation with level of economic diversification, productive capacity or stage of industrialisation of WTO members. Parameters used (binding coverage and share of world trade) do not reflect WTO Members’ need to use tariffs in their economic policies.

17. With these considerations in mind, delegations will assess the draft NAMA modalities not only in light of the numbers proposed therein, but also in light of its structure and architecture. Can it be sufficiently improved (by tinkering with proposed numbers) in order to afford comfort in tariff reductions and binding? In case it can, technically, be improved, are these improvements politically acceptable? Should delegations think of alternative, possibly simpler, architectures that offer greater assurances of a more flexible outcome?

⁹ “*In respect of both [formula] coefficients, the proposed range is not in the mathematical middle between the extreme positions: it is the middle ground as Members have defined it in my consultations.*” (Chairman’s draft modalities text, commenting on the formula, at page 3)

18. Finally, the pervasive and, since the Hong Kong Ministerial, mandated¹⁰ link between NAMA and agriculture is another element that will determine delegations' overall assessment of the appropriateness of the proposed draft modalities. In this respect, it is worth noting that the ranges (ambition) proposed in NAMA are extremely narrow and would, indeed, result in outcomes only marginally different. By contrast, the ranges proposed in Agriculture are wider and do lead to very different outcomes. According to the Chairman, delegations who deem the proposed NAMA outcome to be too ambitious vis-à-vis Agriculture, should work to increase the ambition in Agriculture, and not lower that of NAMA.

III. TARIFF REDUCTION MODALITIES

19. NAMA modalities, since the 2004 Framework text, established a division of developing countries into several smaller groups subject to different specific modalities. That division has operated a fragmentation of the membership and a weakening of the solidarity among different groups. This strategy was tactically supported, and often orchestrated, by developed countries in order to isolate large emerging developing countries whose markets presented greatest commercial interest.

20. In line with the 2004 Framework and according to the principles that all countries must contribute to the negotiations and that there should be a hierarchy or crescendo of tariff concessions according to WTO members' perceived capacity to implement and absorb such tariff reforms, several specific treatments are proposed. With the exception of selected recently acceded members, all countries are called to reform – in different ways and to a different degree – their tariff profile.

A. Developed countries

21. The draft modalities text instructs developed countries to reduce their tariffs according to a Swiss formula, using coefficients of either 8 or 9. The values are presented in brackets, suggesting they may need to be negotiated. The values of the proposed coefficients are slightly above the figures that some developing countries had proposed (5 or 6), which might disappoint those developing countries who actively sought greater market access into developed country markets. Nevertheless, the choice for slightly higher coefficients is likely to

¹⁰ Paragraph 24 of the Hong Kong Ministerial Declaration establishes a direct relationship between the level ambition of NAMA negotiations and that of Agriculture.

reassure somewhat preference-receiving countries because it limits the extent to which preferences are eroded.

22. Regarding the choice of coefficients provided in the draft text, the range between both values is so small that, unsurprisingly, the choice of either only results in marginally different final average cuts, as can be seen below:

	<i>Current Bound average</i>	<i>New Bound average After Swiss (8)</i>	<i>Reduction</i>	<i>New Bound Average After Swiss (9)</i>	<i>Reduction</i>
US					
Peak	48%	6.86%	85.71%	7.58%	84.21%
Simple Average	3.2%	2.29%	28.57%	2.36%	26.23%
EU					
Peak	26%	6.12%	76.47%	6.69%	74.29%
Simple Average	3.9%	2.62%	32.77%	2.72%	30.23%
Japan					
Peak	26%	6.32%	78.95%	6.92%	76.92%
Simple Average	3.9%	1.79%	22.33%	1.83%	20.35%

23. However, as also seen from these examples, the coefficients are very effective in bringing down tariff peaks, triggering sometimes very deep reductions.

24. According to the draft modalities, all tariffs will have to be bound on ad valorem terms after the round. Non ad-valorem tariffs will be converted into ad-valorem rates using a methodology agreed to by the Negotiating Group.

25. Finally, for the sake of comprehensiveness, it is worth noting that the Chair does not instruct developed countries to eliminate low or nuisance duties, that is, tariffs below 2, 3, or 5%. The elimination of low duties had been a request by some developing and developed countries, which met some resistance. The Chair utilises soft language and only requires members (either developed or developing) to “*consider the elimination of low duties*”.

B. Developing countries subject to the Formula

26. Developing countries would need to reduce their tariffs according to a Swiss formula (1). These countries would, however, benefit from limited flexibilities for some of their sensitive tariff lines (2).

27. Only 27 developing countries (about 20% of the WTO membership) will be subject to the formula: Argentina, Bahrain, Brazil, Chile, Colombia, Costa Rica, Egypt, Hong Kong (China), India, Indonesia, Israel, Korea, Kuwait, Malaysia, Mexico, Morocco, Pakistan, Peru, Philippines, Qatar, Singapore, South Africa, Thailand, Tunisia, Turkey, United Arab Emirates, Venezuela. In addition, 4 Recently Acceded Members (RAMs) apply the formula: China, Chinese Taipei, Croatia, and Oman (see below).

1. Swiss formula with two coefficients

28. Draft modalities confirm the Simple Swiss formula as the approach to reduce non-agricultural tariffs¹¹. This means that the draft text abandoned once and for all other options which had been considered, such as a Swiss-type formula (“ABI formula”). In his report to the TNC last year, the Chair sensed there was still no consensus on the structure of the formula, so this choice is a determinant new element.

29. This definitive choice could be, however, surprising given the fact that it also excludes the recently-proposed Uruguay Round approach¹², which according to the Chairman’s comments was not positively received by members. The choice to eliminate the Uruguay Round approach contrasts with the approach taken in Agriculture, where it was kept as a fallback option.

30. The draft modalities text proposes, for the first time, figures for the coefficients: a range between 19 and 23. The use of brackets suggests that the specific numbers for the coefficient, and hence also the entire range, are still subject to negotiations.

31. The tariff reducing formula should apply on every single tariff line, either on WTO bound rates or on marked-up unbound base rates (see below for an analysis of the modalities for unbound tariffs). With the exception of few flexibilities (see below), all non-agricultural tariff lines should be reduced, defined as all those not listed in the WTO Agreement on Agriculture. However, where WTO members’ tariff schedules present certain discrepancies (i.e. non-agricultural lines designated as agricultural), the Chairman suggests that no changes should be introduced¹³.

¹¹ For a detailed analysis of this formula, please refer to “A Formula for Tariff Cuts: Some Considerations with Respect to Developing Countries’ Tariff Profiles”, South Centre (2005), available at: http://www.southcentre.org/publications/AnalyticalNotes/NAMA/2005Aug_Tariffcut_Formula.pdf.

¹² The NAMA-11 group of developing countries mentioned in a recent communication (TN/MA/W/86 of 8 June 2007) that the Uruguay Round approach could be considered as a useful alternative to supplement modalities for tariff reduction.

¹³ In other words, continued divergences on the issue of ‘product coverage’ given the sensitive nature of a few products for some members have led the Chair to propose a continuation of the status quo regarding certain discrepancies with regard to tariff designation (i.e. tariffs that, according to WTO agreements should be non-agricultural but which are designated as agricultural in a few countries).

32. The range proposed for the formula coefficients is extremely narrow and, as a result, there is very little scope to negotiate a more flexible application of the formula within the proposed numbers. In line with other areas of the proposed modalities, the range provided is indeed more a suggestion of final solution than a gamut of options. As the table below shows for a selected number of developing countries, the difference from one coefficient or another is really marginal. For all 27 developing countries applying the formula the coefficients proposed trigger reductions of between 50% and 55% on average and reduce the highest tariffs by up to close to 90%.

33. Moreover, the proposed coefficients for the Swiss formula would result most often in an almost complete elimination of the “overhang” or water between higher WTO-bound rates and the often lower applied rates. In addition, applied tariff rates would be reduced. For instance, more than half of the dutiable applied rates would be reduced in Argentina, Brazil, India, Malaysia, Morocco and South Africa. Reductions to applied rates vary greatly in the group, but could reach more than 30% and are often higher than 10%. These figures already take into account the flexibilities available¹⁴.

	<i>Current Bound average</i>	<i>New average Swiss (19)</i>	<i>Reduction</i>	<i>New average Swiss (21)</i>	<i>Reduction</i>	<i>New average Swiss (23)</i>	<i>Reduction</i>
Argentina							
Peak	35.0%	12.31%	64.81%	13.13%	62.50%	13.88%	60.34%
Simple Average	31.8%	11.89%	62.60%	12.65%	60.23%	13.35%	58.03%
Egypt							
Peak	160.0%	16.98%	89.39%	18.56%	88.40%	20.11%	87.43%
Simple Average	28.3%	11.37%	59.83%	12.05%	57.40%	12.69%	55.17%
Indonesia							
Peak	60.0%	14.43%	75.95%	15.56%	74.07%	16.63%	72.29%
Simple Average	35.6%	12.39%	65.20%	13.21%	62.90%	13.97%	60.75%
Pakistan							
Peak	100%	15.97%	84.03%	17.36%	82.64%	18.70%	81.30%
Simple Average	54.60%	14.10%	74.18%	15.17%	72.22%	16.18%	70.36%
Philippines							
Peak	50.0%	13.77%	72.46%	14.79%	70.42%	15.75%	68.49%

¹⁴ These numbers are taken from the tariff reduction simulations conducted by the WTO Secretariat in 2006.

Simple Average	23.4%	10.49%	55.19%	11.07%	52.70%	11.60%	50.43%
South Africa							
Peak	60.0%	14.43%	75.95%	15.56%	74.07%	16.63%	72.29%
Simple Average	15.8%	8.63%	45.40%	9.02%	42.93%	9.37%	40.72%
Venezuela							
Peak	40.0%	12.88%	67.80%	13.77%	65.57%	14.60%	63.49%
Simple Average	33.1%	12.07%	63.53%	12.85%	61.18%	13.57%	59.00%

34. An important element of the coefficients proposed is that they do not reflect a balance between developed and developing countries' reduction commitments. These coefficients will indeed frustrate developing countries who argued that the principle of Less Than Full Reciprocity required developing countries to undertake, in percentage terms, lesser reductions than developed countries. Under the proposed text developing countries would reduce their tariffs on average by 50-55% whereas developed countries reductions average 40-43%.

35. If one isolates NAMA-11 countries and the 3 major developed countries (EC, Japan, USA), the contrast is even more evident: NAMA-11 countries would make cuts of 60% on average whereas the developed countries would reduce their averages by half that amount, 28%.

Impact on National Bound Averages (%) NAMA-11 and major developed countries

<i>NAMA-11 countries</i>	<i>MFN Average</i>	<i>Bound Average</i>	<i>Swiss 20</i>	<i>Reduction</i>
Argentina	15.30	31.80	12.28	61.39
Brazil	15.00	30.80	12.13	60.63
Egypt	21.20	28.30	11.72	58.59
India	28.70	34.30	12.63	63.17
Indonesia	6.60	35.60	12.81	64.03
Philippines	6.30	23.40	10.78	53.92
South Africa	5.20	15.80	8.83	44.13
Tunisia	24.90	40.60	13.40	67.00
Venezuela	12.10	33.10	12.47	62.34
AVG NAMA-11	15.03	30.41	12.07	59.47
<i>Developed countries</i>	<i>MFN Average</i>	<i>Bound Average</i>	<i>Swiss 08</i>	<i>Reduction</i>
EC	4.30	3.90	2.62	32.77
Japan	2.70	2.30	1.79	22.33
USA	3.90	3.20	2.29	28.57
AVG	3.63	3.13	2.23	27.89

36. The coefficient in the Swiss formula that would make developing countries' average reductions similar or equal to that of developed countries (in case these latter use a coefficient of 8) is 37. This figure is in fact much closer to the 35 which the NAMA-11 group of developing countries favour.¹⁵

37. A final point worth of notice regarding the proposed coefficients and the spread among them concern the second balance that NAMA modalities will have to strike: that between NAMA and Agriculture. The question of parallelism between NAMA and agriculture is central to the NAMA modalities and would require the ranges proposed in NAMA to match the ranges proposed in Agriculture (market access and domestic support). Since the NAMA ranges are narrow and to a large extent insignificant, adjustment with the final ambition in agriculture is very difficult. Would the choice for a Swiss 23 be equivalent to a 73% reduction of US domestic support (upper level proposed in the Agriculture modalities¹⁶)?

38. While the answer to this question varies greatly from one delegation to another, most developing countries will say that ambition in the NAMA draft is by far greater than that of Agriculture, or that NAMA modalities require greater concessions from developing countries than those in Agriculture require from developed nations.

2. *Treatment of unbound duties: mark-up*

39. The Chair's proposed modalities confirm that reductions will be applied on all WTO bound tariff rates and, in addition, on tariff lines that have not yet been bound at the WTO. This is unprecedented in WTO/GATT negotiations as unbound tariff lines are beyond the scope of WTO Agreements and are, in principle, not under negotiation. In addition, tariff binding commitments have previously been considered as a full tariff concession.

40. However, the formula would not be applied directly on unbound tariff rates (applied rates). Rather, unbound lines would be marked up by a proposed 20 points first to establish the base rates on which the formula should be applied. The proposed value of the mark up is below many developing countries' expectations (a minimum mark-up of 30 had been mentioned), but is actually higher than the mark up of not more than 5 points asked by certain members.

41. Nevertheless, given the highly harmonising effect of the Swiss formula, the final rate after applying the formula barely varies irrespective of the value of the mark-up used. For instance, for an unbound tariff rate of 10%, a mark up of 5, 20

¹⁵ NAMA-11 countries have argued that there should be a difference of 25 points between the coefficients applied by developing and developed countries respectively in order to ensure that the mandate of less than full reciprocity is respected.

¹⁶ Domestic support in Agriculture draft modalities, tiered formula for the overall reduction of trade distorting domestic support (paragraph 2).

and 50 points result in the following final rates and reductions after applying a Swiss formula with a coefficient of 19:

Unbound tariff of 10%, subject to mark up and the Swiss formula 19

<i>Mark up of</i>	<i>Marked-up base rate</i>	<i>Final rate</i>	<i>Reduction</i>
05 points	15	8.38%	44.12%
20 points	30	11.63%	61.22%
50 points	60	14.43%	75.95%

42. The result of the mark-up approach and the application of the formula mean that, for low applied duties, the actually applied rate will not be reduced. In such cases, the new bound rate that will need to be scheduled would be higher than the applied rate, offering some, albeit reduced, margin or “water”. However, in the case of higher duties (all those above a threshold), the applied rate will need to be reduced and bound at a new lower level. For instance, an unbound tariff rate of 25% will have to be bound, after mark-up and application of the formula, at 13.36% (hence, a reduction of 46.5%):

<i>Unbound tariff rate (applied)</i>	<i>Marked-up base rate</i>	<i>Final rate after Swiss (19)</i>	<i>Cut to applied rate</i>
05% duty	25	10.80%	-
12% duty	32	11.92%	0.65%
15% duty	35	12.31%	17.90%
25% duty	45	13.36%	46.56%
50% duty	70	14.94%	70.11%

43. If one considers that many tariff lines have not been bound at the WTO precisely because of their sensitive nature, the proposed modalities will certainly present a challenge for countries concerned, particularly where the unbound rates need to be reduced.

3. Flexibilities: partial or no application of the formula to certain products

44. According to the proposed NAMA modalities, the effects of the formula can be mitigated by certain “flexibilities”, usually referred to “of paragraph 8” (after their location in the 2004 NAMA Framework). Access to these flexibilities is confirmed in the Chair’s text under a new paragraph 7.

45. The flexibilities offer developing countries three options:

- a. Entirely exclude a limited number of tariff lines from the formula; or,
- b. Apply softer reductions (half of those otherwise required by the formula) to a limited number of lines; or,

- c. Benefit from a higher coefficient in the formula (3 points higher than otherwise required, that is, 22-26) if the flexibilities are not used, that is, if no tariff line is protected from the reductions.

46. The first two options in these flexibilities had already been secured in 2004. What is new is that the Chairman's text removes the brackets around the figures, confirming the values which had been previously recorded and suggesting that these numbers are not open for negotiation (unlike the formula coefficients). These numbers, combined with the coefficient proposed for the Swiss Formula will certainly disappoint most developing countries. The last item, however, is the result of more recent discussions. However, these flexibilities are limited or circumscribed in many ways, largely compromising their utility:

- a. Only a limited number of tariff lines can be protected:
 - 5% in case of total exemption from the formula
 - 10% in case of half formula cuts
- b. Tariff lines to be protected can not represent more than:
 - 5% of the total value of national non-agricultural imports in case of total exemption from the formula
 - 10% of the total value of national non-agricultural imports in case of half formula cuts
- c. Options a, b, and c cannot be cumulated or combined, that is, developing countries must choose to either exempt some lines from the formula or to apply lesser cuts to selected lines.
- d. An entire sector (defined as a chapter of the Harmonised System of tariff nomenclature) cannot be excluded from reductions

47. These conditions, combined with the fact that very few lines can be protected greatly reduce the scope of the flexibilities. Developing countries had, in fact, argued that the number of lines that could be protected under the flexibilities should be increased. Developing countries had also argued that the scope of the flexibilities was directly linked to the level of ambition of the formula, meaning that the higher the tariff cuts, the greater the flexibilities should be. That balance varies from one delegation to another, but many are likely to assess the flexibilities too restrictive given the coefficients proposed (19-23). If the scope of the flexibilities cannot be changed (absence of brackets), the only option left to lower the depth of tariff cuts is an increase of the value the coefficients, but the ranges proposed by the Chairman reduce enormously that manoeuvring space.

48. Finally, with respect to the flexibilities, it is interesting to note that the Chairman does not include the issue of transparency in his modalities. Several delegations seeking greater market access have, in fact, insisted that developing countries utilising the flexibilities indicate which products they were willing to protect and possibly engage in bilateral discussions to avoid protecting products or sectors of interest to other members. This would have further restrained the ability of developing countries to utilise the flexibilities and was consistently opposed by most developing countries. While the Chairman observes that there

may continue to be pressure from some members for bilateral consultations, it is positive that the proposed draft text does not include mandatory modalities related to transparency in the use of flexibilities.

C. Small and Vulnerable Economies

49. The Chair's draft modalities for Small and Vulnerable Economies (SVEs) confirmed the definition of SVEs for purposes of NAMA flexibilities (developing countries whose share of non-agricultural trade is below 0.1% of world non-agricultural trade). The modalities also proposed concrete flexibilities, which replicate the tariff reduction architecture that had been proposed by the SVE proponents. Those are certainly positive elements, in the sense that they incorporate SVEs concerns into the modalities.

50. Nevertheless, the draft NAMA modalities have also proposed specific numbers (not ranges) to be plugged into the proposed architecture, which would force most of the SVEs to undertake very deep tariff reductions.

51. According to the criteria retained for the selection of SVEs for purposes of NAMA modalities, all SVE proponents as well as other 14 additional WTO members (comprising certain Recently Acceded Members (RAMs)) would be able to utilise these flexibilities¹⁷.

52. The proposed modalities consist of:

- a. 3 bands, which divide SVEs according to their current bound average.
- b. Countries in each band must reduce their bound averages (not line by line) to meet a new lower bound average.

	<u>Current Simple Bound Average</u>	<u>New Simple Bound Average</u>
1	above 50%	22%
2	between 30% and 49%	18%
3	between 0 and 29%	14%

- c. Given the disproportionate effect that such modalities would have on Fiji, the country with lowest binding coverage among SVEs (45%), modalities stipulate that Fiji should be deemed to fall in the first, highest band (and not in the middle band as it would have been otherwise required according to its binding average).
- d. In addition, minimum 10% reductions must be undertaken on all lines, except 5% for which flexibilities are given.

¹⁷ Albania, Antigua and Barbuda, Barbados, Belize, Bolivia, Botswana, Brunei Darussalam, Dominica, Dominican Republic, Ecuador, El Salvador, Fiji, Gabon, Georgia, Grenada, Guatemala, Guyana, Honduras, Jamaica, Jordan, Mongolia, Namibia, Nicaragua, Panama, Papua New Guinea, Paraguay, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Swaziland, Trinidad and Tobago, and Uruguay.

- e. These modalities amount to a variation of paragraph 6 (see below) in the sense that countries are requested to reduce their overall bound average for non-agricultural products. Since the approach is not within brackets, it tends to exclude other approaches proposed.

53. According to these modalities, many countries of the group will have to reduce their bound average very dramatically, sometimes as much as they would have had to under the Swiss formula. The reduction that SVE proponents would be required to undertake would correspond, on average, to 49% that is, about the same the average reduction of developing countries under a Swiss Formula with a coefficient of roughly 22. The reduction can, on average, in fact be even larger than some developing countries would undertake under the formula.

	<i>Current Bound Average</i>	<i>Final Bound Average</i>	<i>Reduction</i>	
band 1	Barbados	73.00%	69.9%	
	St. Kitts and Nevis	70.80%	68.9%	
	St. Vincent and the Grenadines	54.60%	59.7%	
	St. Lucia	53.90%	59.2%	
	Antigua and Barbuda	51.40%	22%	57.2%
	Trinidad and Tobago	50.50%		56.4%
	Grenada	50.00%		56%
	Dominica	50.00%		56%
	Fiji*	40.00%		45%
band 2	Jamaica	42.40%		57.55%
	Nicaragua	41.50%		56.6%
	Guatemala	40.80%		55.9%
	Bolivia	40.00%		55%
	El Salvador	35.70%	18%	49.6%
	Dominican Republic	34.20%		47.4%
	Honduras	32.60%		44.8%
	Paraguay	33.60%		46.4%
	Papua New Guinea	30.10%		40.2%
band 3	Mongolia	17.30%		19.08%
	Albania	6.60%		?
	Ecuador	21.20%	14.00%	33.96%
	Georgia	6.50%		?
	Jordan	15.20%		7.89%
	Panama	22.90%		38.86%

54. It is true, however, that it is difficult to compare the reductions that SVEs would be required to undertake and that of countries under the formula because the approaches are very different. SVEs are granted the flexibility to distribute their reductions, since they need to reduce their overall average but not each of their individual tariff lines. This does afford a more flexible treatment. However,

since the new averages to be reached are so low, countries will necessarily need to undertake large reductions, including reforming their applied rates very often. This is even more likely since minimum reductions of 10% must be applied on all tariff lines. If the modalities for SVEs foresee the adoption of new averages which are so much lower than the SVEs' current average, minimum line by line reductions could have been excluded.

55. One interesting point to note is that some of the RAMs which fall under the SVEs category already have bound average rates lower or very close to the target final rate proposed for the bottom band (14%). Albania (6.6% bound average rate currently) and Georgia (6.5%) would, indeed, not need to make any reductions to meet the final average rate. In addition, the mere application of a minimum 10% on each tariff line could bring Jordan's bound average rate (15.20%) below the 14% ceiling. It could, therefore, be argued (and specified in the modalities) that these countries should only respect the 14% new bound average, without making additional concessions.

56. According to the proposed modalities, only 5% of SVEs' tariff lines, that is to say, a very small number of tariff lines, can be wholly excluded from any tariff reduction.

57. In addition, all unbound lines will also need to be bound at the WTO and included in the calculation of SVE's new bound average. Since most SVEs have already bound 100% of their tariffs at the WTO, this will require efforts from only a few SVEs, but very particularly from Fiji, whose binding coverage at the WTO is of only 45%.

58. Finally, an important question regarding the treatment of SVEs in NAMA modalities is whether or not the proposed structure can be sufficiently improved by an increase in the actual numbers proposed by the Chair. It would seem that technically, it would suffice to increase the rate of the new final bound average for each of the bands. Politically, however, increasing these numbers, or increasing them enough, will be extremely difficult. The hierarchy of contributions in NAMA has locked the SVEs below countries with low levels of binding coverage (paragraph 6) and just above larger developing countries (subject to the formula). Depending on what the ambition for these other groups is, the scope for improvement of this solution could be very narrow. For instance, if paragraph 6 countries bind all or most of their tariffs at 28.5% and developing countries' new bound average is of around 15%, this will be the range within which the SVEs will have to place themselves.

59. Given these floor and ceiling, an important question is whether a change of structure for tariff reductions would be needed, for instance, reconsidering the benefits of a "paragraph 8 solution". This could be done by offering the SVEs a flexible approach to tariff reductions consisting of a higher coefficient in the formula and a more favourable paragraph 8 (for instance, the right to exclude 10% of lines from the formula and to apply softer cuts to other 20% of lines). This

would have at least two benefits. First, to generate a credible fall back position in the event the proposed paragraph 6 solution is not acceptable. Second, it would enhance the solidarity among developing countries, divided currently among those that apply the formula and those who do not.

60. Finally, an important challenge regarding the scheduling and implementation of these modalities (see below for implementation) relates to the fact that, to discharge their obligations at the end of the implementation period, countries will need to plan their tariff policy over the next years in a way to guarantee their average coincides, by the end of the proposed 9-year implementation period, with the figures negotiated in NAMA. This exercise will certainly constitute a major challenge for some countries of this group given their common lack of technical and administrative capacity.

D. Recently Acceded Members

61. The group of Recently Acceded Members (RAMs) is a very heterogeneous group, whose need for certain additional flexibilities has been recognised on the account that they had to make large concessions to join the WTO and, at least for some, such concessions are still being implemented. The Chair's text on NAMA confirms that all countries falling under this category, that is, all those that have acceded to the WTO since 1995¹⁸, will be able to access flexibilities. However, not all countries of this group will have access to a treatment of the same nature. The text proposes indeed a crescendo of concessions, ranging from no concessions at all to full application of the formula with an extended implementation period:

- a. Certain RAMs would make no commitments under NAMA by virtue of their economic situation and their recent accession:
 - Armenia (2003¹⁹), Kyrgyz Republic (1998), The FYR of Macedonia (2003), Moldova (2001), Saudi Arabia (2005) and Viet Nam (2007).
- b. RAMs that fall under the SVE criteria, that is, whose share of world trade of non-agricultural products is below 0.1%, would be treated as SVEs and reduce their bound average rate to a new bound average of 14%, according to the bottom band:
 - Albania (2000), Ecuador (1996), Georgia (2000), Jordan (2000), Mongolia (1997), and Panama (1997).
- c. Other RAMs not falling under either of the previous groups would apply the formula as other developing countries, but would be given flexibilities in the form of additional time to implement concessions. They would only start to implement Doha concessions 2 years ("*rest*" or "*grace period*") after

¹⁸ Albania, Armenia, China, Chinese Taipei, Croatia, Ecuador, FYR of Macedonia, Georgia, Jordan, Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Saudi Arabia, and Viet Nam.

¹⁹ Year of accession to the WTO.

they have finished implementing their specific (line by line) accession concessions. That is, new concessions do not start 2 years after the end of the overall implementation period but rather 2 years after the end of implementation of a concession in a particular tariff line, even if concessions on other tariff lines extend beyond. Moreover, these countries would also have 2 additional years to finalise overall implementation of the Doha NAMA commitments (11 years of implementation instead of 9):

- China (2001, ends implementing accession commitments in 2010),
- Croatia (2000, ended implementing accession commitments in 2005),
- Chinese Taipei (2002, ends implementing accession commitments in 2011), and
- Oman (2000, ends implementing accession commitments in 2009).

62. This differentiation among countries and the options proposed by the Chair are tailor made to fit the concerns of WTO members who had concerns with granting large flexibilities for all countries of the group. In fact, the Chairman observes in his introductory comments that there should be a differentiation of these countries by virtue of *“the strength of their economies and the extent to which they have benefited from NAMA trade”*.

63. The four countries applying the formula have been treated in a particularly circumscribed manner, resulting in a much more limited treatment than China and Croatia had proposed, which would have allowed RAMs applying the formula to enjoy a coefficient 50% higher than that used by other developing countries, together with flexibilities to exempt or apply lesser reductions to a larger number of tariff lines.

64. While there is large support for a differentiated treatment of RAMs, it is worthwhile mentioning that the hand-picking of members for purposes of modalities could constitute an important (and negative) precedent in WTO/GATT negotiations.

E. Members with a low level of binding coverage

65. What has now been commonly denominated as “paragraph 6 countries” (because of the location of these flexibilities in the 2004 NAMA framework), comprise those WTO members who have bound a very low proportion of their non-agricultural tariff lines at the WTO. The threshold that defines members of this group, on which there had not been many divergences, has been confirmed

in the Chair's draft modalities as a binding coverage of not more than 35%²⁰. This criterion makes 12 developing countries eligible for these flexibilities²¹.

66. The text submitted by the NAMA Chair confirms the architecture of these flexibilities under a new paragraph 8. The only innovative aspect of the Chair's proposal is the actual numbers that determine the extent of the contribution required under this paragraph. Modalities for countries with a low level of binding coverage consist of:

- a. Countries of this group must undertake new binding commitments at the WTO to increase their binding coverage to at least 90% of non-agricultural products (mandatory binding).
- b. The rate at which current tariff lines are bound at and the rate at which new bindings will be made must average 28.5%
- c. While the volume of binding commitments is mandatory under the modalities, the rate at which countries undertake those commitments is totally discretionary as long as the overall selected average is met at the end of the implementation period.

67. The fact that the Chairman has confirmed the approach that had been proposed by countries in this paragraph must be welcomed; as it should be that the Chair has not proposed an outcome where all tariff lines were bound, as some members have suggested. Paragraph 6 countries had argued that if they were subject to a mandatory, final bound average rate, they wished to have flexibility as to how many lines to bind or not. In other words, both values were pegged, the lower the rate of the final average countries had to reach, the larger the number of lines that would not be bound at the WTO, and vice versa.

68. The Chairman proposed a higher level of binding coverage than that which had been requested by paragraph 6 countries: that is 90% instead of 70%. In this sense, and since both numbers should remain pegged, if one moves the other should move, too. If the level of binding coverage increases, so should the average rate increase. One option to do this is to adopt the same logic to both the binding coverage and to the average rate: both figures should correspond to the current figures for all developing countries (the figure of 28.5% of average rate corresponds to the average of all developing countries). This would mean that, for an average rate of 28.5%, the maximum binding coverage should be of roughly 84% (developing countries' average, excepting paragraph 6 countries and LDCs).

69. Another option to maintain this parallelism is to increase the final average rate in a way that it matches the newly proposed 90% binding coverage.

²⁰ The Chairman of the Negotiating Group on Market Access had already reported in his NAMA report to the TNC (TN/MA/W/80) that the brackets around the 35% threshold could be removed because there was consensus around this figure.

²¹ Cameroon, Congo, Côte d'Ivoire, Cuba, Ghana, Kenya, Macao (China), Mauritius, Nigeria, Sri Lanka, Suriname and Zimbabwe.

70. One additional challenge that arises from this paragraph is its translation into a schedule of commitments (see below on implementation). In practical terms, in order to submit draft schedules, governments will need to achieve the required binding from the start of the implementation period and schedule all tariff rates for each year, so that, at the end of implementation, national bound averages correspond to the mandatory negotiated average. This will constitute a serious difficulty given the administrative capacity of many countries that fall under these flexibilities.

F. Least Developed Countries

71. The NAMA draft modalities confirm, as has been consensual for some time, that LDCs will not make tariff reductions, either through the formula or through sectoral initiatives. Neither will LDCs be asked to make mandatory concessions. However, LDCs are also called to contribute to the negotiations, by increasing – on a voluntary basis – the amount of tariff lines they have bound at the WTO. The new language proposed by the Chairman clarifies that LDCs may determine which and how many new tariff lines to bind at the WTO (“*extent*”) and the rate at which to undertake such bindings (“*level*”).

72. One issue which has recently surfaced in the negotiating group, which modalities do not mention, is that, while exempted in principle from tariff reductions, LDCs members of a Customs Union (CU) to which a developing country subject to the formula is also member, will be affected by the modalities. This is the case of Lesotho, a member of SACU with South Africa. This can also be the case of SADC LDC members (Angola, Mozambique, Tanzania) since SADC has plans to implement a CU and a Common External Tariff in the near future. While the Chairman acknowledges in his comments that this could be a problem, he does not propose a solution in the draft modalities.

73. In addition, as opposed to the rest of the WTO membership, which is subject to a strict obligation to schedule all bound tariff lines in *ad valorem* terms, LDCs are only “*encouraged*” to convert existing non-*ad valorem* tariff lines into *ad valorem* equivalents. However, the draft modalities clarifies that all new binding commitments that might be undertaken must be scheduled in *ad valorem* terms.

74. Another area of interest to LDCs, covered under NAMA modalities, is the decision made at the WTO Hong Kong Ministerial Conference²² to extend duty free and quota free treatment for products originating in LDCs. In that respect, the Chair instructs all developed countries and those developing countries in a position to do so to:

²² Annex F of the 2005 WTO Ministerial Declaration on “*Measures in Favour of Least Developed Countries*”

- a. communicate which products from LDCs already have free access to their markets,
- b. communicate which domestic schemes or arrangements will be used to implement the new obligation to increase duty-free and quota-free treatment for LDC products covering at least 97% of all tariff lines,
- c. communicate an indicative timeline for the provision of fully free access to products not currently covered in such schemes

75. The text does not propose anything new and reflects the difficulty in advancing in the direction of granting free access to all LDC products, particularly manufacturing products. In fact, it is now well-known by LDC delegations that a mandatory liberalisation of 97% of tariff lines only allows countries to continue imposing barriers to roughly 300 products, whereas LDCs typically do not have exports on more than a handful of tariff lines²³. Hence, the effectiveness of this decision rests on which lines are liberalised for LDCs and which protected.

76. One interesting proposal made by the Chair is that the communication of items which benefit of free access must be made by the time members submit their comprehensive draft schedules. However, it would be worth clarifying the formulation of paragraph 16, and whether the timeline for such communications corresponds to the submission of revised final schedules, or to initial comprehensive draft schedules (language of paragraph 3). The nuance matters because the Chairman proposes that initial schedules be submitted 3 months after the adoption of modalities whereas no deadline is proposed for the submission of final schedules.

77. Finally, one area with respect to duty and quota free access to LDCs on which the Chair refrained from proposing modalities language concerns the improvement of the Rules of Origin that apply to trade preferential schemes. The simplification of these rules of origin had in fact been a long standing request of LDCs in order to enhance access to these preferences thereby improving their effectiveness. Nonetheless, the modalities do not mention this area of work, not even to instruct members to intensify their work on that area, despite a detailed proposal by the LDCs in 2006. In his initial observations, the Chairman merely mentions that bilateral discussions may be needed to fulfil this part of the mandate.

IV. IMPLEMENTATION OF CONCESSIONS AND SCHEDULING

A. Developed countries

²³ Many LDCs have very concentrated exports, with not more than 10 tariff lines accounting for over half of their exports.

78. Commitments regarding tariff reduction through the Swiss formula are to be implemented over a period of 5 years. However, reductions have to start from the first year of implementation, and be undertaken in equal instalments until the end of the implementation period. In other words, countries are not given the option of “back-loading” tariff reductions, or leaving the reforms they are required to undertake for the last year or months of the implementation period.

79. The Chairman proposes that initial draft schedules containing commitments in NAMA be submitted three months after the adoption of NAMA modalities (see below).

B. Developing countries

80. Commitments regarding tariff reduction through the Swiss formula are to be implemented over a period of 9 years. However, reductions have to start from the first year of implementation, and be undertaken in equal instalments until the end of the implementation period. In other words, countries are not given the option of “back-loading” tariff reductions, or leaving the reforms they are required to undertake for the last year or months of the implementation period.

81. This approach has two benefits. First, it ensures that countries which expect to benefit from the concessions negotiated as part of NAMA negotiations will not need to wait until the end of the implementation period to see some of these opportunities materialize. Liberalisation would happen from the start of the implementation period for certain products. Second, by requiring countries to distribute the implementation of their commitments in equal instalments to be implemented yearly, will generate a more structured road-map, possibly avoiding delays of implementation at the end of the period, reducing the likelihood of imperfect or partial implementation and avoiding requests for derogations.

82. However, this approach also increases the challenge that delegations will face in implementing commitments. With the exception of certain RAMs, WTO members will need to start implementing their concessions from the very first year of implementation. Difficulties are likely to be all the more significant given the ambition of tariff reductions being negotiated. Given the scope (coverage) and depth (ambition) of such tariff cuts, the option to back loading certain concessions could have proven very useful and might be introduced in the modalities as special and differential treatment for developing countries only. Otherwise, a useful strategy would be to adjust the level of ambition (requiring lesser tariff cuts) in a way that is compatible with the short period of implementation being proposed.

83. The scheduling phase will prove particularly difficult, since yearly tariff reductions have to be planned for a given number of products over the coming

decade. In the case of paragraph 6 countries and SVEs, who would need to bind all their tariff lines immediately after the end of the Round, scheduling could prove particularly challenging given their lack of technical and administrative capacity. The challenge will be even greater since the Chairman's text proposes that initial draft schedules be submitted by all members only 3 months after adoption of the modalities.

84. For example, the schedule of a SVE, whose current bound average is of 47.85%, is illustrated below, in the event it has to meet an average of 22% (28.5% in the case of a country with a low binding coverage). The rate of each tariff line would be defined for each of the implementation years as illustrated, ensuring that:

- a. All tariff lines (except those for which flexibilities were granted) are bound as from Year 1 of implementation
- b. the overall average rate is met at the end of the implementation period,
- c. reductions are distributed in equal instalments (stages) throughout the implementation period,

Tariff line		Bound average	Year (%)								
			1	2	3	4	5	6	7	8	9
030613	Shrimps	63%	63	63	63	63	63	63	60	60	60
630210	Bed linen	-	36	36	24	24	18	12	12	6	6
870321	Motor vehicles	-	45	40	35	30	25	20	15	10	0
...	All products... ²⁴		x	x	x	x	x	x	x	x	x
Average of all non-agricultural tariff lines		47.85%	45.0	42.1	39.2	36.4	33.5	30.6	27.8	24.9	22.0
Equal yearly reductions and overall reduction at the end of the implementation period			-6%	-6%	-6%	-6%	-6%	-6%	-6%	-6%	54%

85. As illustrated in this example, all lines are bound as from the first year of implementation. Bed linen and vehicles had not yet been bound in this example, but are attributed new bound rates since the first year. Shrimps had already been bound, so the existing rate was used as the base rate for reductions. Reductions are distributed equally (6%) every year of implementation, but the adherence to the overall average is only assessed at the end of the period (9th year). Individual lines need not be reduced every year, but a minimum 10% reduction on each line

²⁴ All non-agricultural products would have to be covered by such schedules, except for 5% of tariff lines in the case of SVEs (95% of products covered) and 10% of tariff lines in the case of paragraph 6 countries (90% coverage).

(in the case of SVEs, not paragraph 6 countries) must apply at the end of the implementation (in shrimps, in this example).

86. As illustrated, scheduling will be a complex exercise, requiring great administrative support from developing country capitals. The exercise will be all the more complex in the case of countries that need to bind a substantive share of their tariff lines (such as those of paragraph 6).

V. OTHER AREAS

A. Preference erosion

87. Despite the importance that the erosion of non-reciprocal preferences has vested in NAMA negotiations and the strong divergences opposing beneficiaries to non-beneficiaries with respect to it, this topic receives only marginal attention in the draft modalities text proposed by the Chairman. Moreover, the actual modalities proposed reflect a marked narrowing of this issue, both in terms of the gravity of the problem and the scope of products affected. The text attempts to identify the scope of erosion and to propose a solution thereto:

- a. It identifies a list of highly sensitive preferential products in the two main preference granting countries (23 tariff lines in the EU and 16 in the USA) utilising, as a criterion for the identification of such lines, the volume and importance of trade in such lines for preference-receiving countries²⁵.
- b. It then proposes that, for those products only and only by the EU and the USA, NAMA tariff reduction commitments be implemented over a longer time period of additional 2 years.
- c. Capacity building should be provided to LDCs and members in their early stages of development to assist these countries in "*addressing challenges that may arise from increased competition*" as a result of preference erosion

88. The first pattern of the proposed modalities is that they constitute the minimum denominator among most members, who prefer a solution outside the trade ambit – that is, through aid and assistance – but with an extremely circumscribed trade complement – in the form of a limited extension of the implementation period for specific products. While this is in line with the architecture preference receiving countries had proposed, it falls way below what these countries expected, particularly because (i) the number of proposed affected products has been hugely narrowed down²⁶ and (ii) the extension of the implementation period is really limited (2 additional years only).

²⁵ The text elaborates (to reach a more restrictive result) on the methodology utilised by the WTO Secretariat in this area. See, for instance: "*NAMA Negotiations: Assessing the Scope of the Problem on Non-Reciprocal Preference Erosion*" Room document, 14 June 2006.

²⁶ The original list of sensitive preference products submitted by the ACP countries to the Negotiating Group comprised 542 tariff lines at the 8-digit level in the European Communities and 610 in the United States. Application of several other filters, such as the margin of the preference, the volume of trade in

89. The second observation with regard to the modalities proposed is that an extension of the implementation period is proposed and favoured by most members as a bridge to assist preference-receiving countries to adjust to a change in their trading and competitiveness conditions. Nonetheless, there is no correlation between the time proposed and the actual difficulties preference countries may face. There is not even an attempt to relate the implementation period to actual reforms or adjustment needs. As is common with implementation periods under the WTO, the years are simply the result of bargains among members, not an analysis of whether entire sectors, such as textiles, can effectively adjust within the proposed 7 years.

90. The type of solution reflects a change of perception regarding the utility of preferences, even from beneficiaries. It builds on the realisation that preferences are set to lapse, both by virtue of multilateral liberalisation and of regional and bilateral trade agreements. Most members, including many of the preference-beneficiary countries, have thus shifted their demands from the continuation or improvement of trade preferences to simply an arrangement that ensures these preferences are not lost too abruptly (i.e. an extended liberalisation period for highly preference-sensitive products). An important question is, irrespective of the extent to which preferences have been useful, whether they will be supplemented by other trade and development frameworks to assist vulnerable developing countries to boost their trading capacity.

91. With respect to such new frameworks, it is worthwhile mentioning that the commitment to provide capacity building measures is drafted in soft legal language: *"we are committed to exploring and enhancing effective delivery mechanisms"* (see below for capacity building). The paragraph links the provision of assistance to preferences, but only in a very vague manner, without mentioning what aid would entail, its form and channels, its amount, etc.

92. Finally, a third aspect of the proposed modalities is that they have omitted the request of non-preference beneficiaries to be compensated for any extension of preferences, however marginal, granted to preference-receiving countries. It had been proposed, for instance, that countries affected negatively by the choice of sensitive preference tariff-lines, be granted the same preferences for such products. The assumption of the text is probably that the extension of the implementation period is so small that it only marginally delays the liberalisation of such products, not requiring any compensatory mechanism.

B. Capacity Building measures

each line, and the importance of preferential trade for specific ACP countries, had led to a restriction of tariff lines to 33 in the US and 39 in the EU.

93. In spite of the importance of capacity building and in spite of the attention that the WTO Aid for Trade initiative has attracted over the past months, the draft NAMA modalities falls short of proposing anything meaningful or new. This is not totally surprising since it is a mere reflection of the lack of political will to (i) create new aid mechanisms, (ii) concentrate aid delivery outside the hands of traditional donors, and (iii) significantly increase the amounts of aid available. The modalities propose that:

- a. Members endeavour to explore new aid delivery mechanisms and/or endeavour to enhance the effectiveness of existing mechanisms.
- b. Members should, in doing so, bear in mind the need to assist developing countries to take greater advantage of trade opportunities by meeting technical requirements and other non-tariff barriers and by diversifying their export products and markets.

94. The paragraph does not create any concrete obligation. Neither does it effectively link the delivery of trade-related assistance to specific needs and concerns arising out of NAMA (e.g. industrialisation, productive and export diversification, diversification of export markets, fiscal reform and loss of fiscal revenue, etc.). The language proposed does not mention who will provide such assistance, when it will be provided, or what possible mechanisms of aid - delivery might be (for instance, neither Aid for Trade nor the Enhanced Integrated Framework are cited).

VI. AREAS WHERE NO FINAL MODALITIES LANGUAGE WERE PROPOSED

A. Sectoral Negotiations

95. Whereas tariff reduction modalities through the formula are still being negotiated, and whereas many developing countries have expressed views that their participation in sectoral tariff reduction modalities would depend on the overall ambition of the formula, the Chair's NAMA modalities text includes sectoral initiatives, albeit with no final legal modalities language. The text actually instructs WTO members to intensify their discussions so as to incorporate sectoral initiatives in the final NAMA modalities.

96. Many developing countries will certainly resist this instruction and continue to think that it is premature to commit to sectoral tariff elimination without knowing the full extent of their concessions under the Swiss formula.

97. Given the uncertainty that weights over these sectoral initiatives, it can be difficult to understand what the Chair's purpose might have been in locking certain elements referring thereto in his draft modalities, such as:

- a. The Chair enumerates the sectors on which sectoral tariff elimination have been proposed and negotiated²⁷, even though it is still not clear whether any or all of these initiatives will garner sufficient support, be agreed to and completed in time for inclusion in modalities.
- b. The Chair describes certain areas of work regarding these initiatives where “progress has been made”. This includes the proposed methodology for determining critical mass in one sector (it was suggested to use share of world trade and the level of participation of a given producer). These proposals have, however, not been agreed to. Mentioning these approaches, which were discussed only in certain plurilateral circles, in a text whose vocation is to be adopted multilaterally could lock in these elements, binding all WTO members.

98. The Chair has also recorded certain elements confirming decisions that had been made previously at the multilateral level. Very important, the draft modalities text confirms that participation in sectoral initiatives is totally voluntary (“*non mandatory basis*”). This, however, does not shield countries from pressure to join an initiative, particularly as the concept of “critical mass” is defined for each initiative.

99. The Chairman also clarifies that initiatives for sectoral tariff reduction must prescribe a level of liberalisation that is more ambitious than otherwise prescribed under the mainstream modalities (Swiss formula). This clarification implies that a decision to harmonise tariffs (above the level that would have been required by the Swiss formula), as proposed by Turkey for textiles and clothing products, would not be compatible with the modalities.

100. Finally, the Chairman also suggests a timeframe for the negotiation and completion of such initiatives:

- a. Proponents of a sectoral initiative must submit the conditions of an initiative (i.e. definition of critical mass, product scope, level of tariff reduction, Special and Differential treatment, and implementation period) by the time NAMA modalities are agreed to.
- b. WTO members have one month after that to express their interest in joining one of the proposed initiatives (the indication of interest must be made to proponents as well as to the WTO Secretariat).
- c. Proponents of a given initiative then have 2 months (3 months after the agreement of modalities) to assess whether the initiative has garnered sufficient support (critical mass). Concessions under any given successful initiative must be definitely scheduled.
- d. The Chairman does not mention in his text, but it had been agreed that concessions within possible initiatives should then extended to the entire membership (multilateralised).

²⁷ Paragraph 11 of the draft modalities text: “*automotive and related parts; bicycle and related parts; chemicals; electronics/electrical products; fish and fish products; forest products; gems and jewellery; hand tools; open access to enhanced health care; raw materials; sports equipment; toys; and textiles, clothing and footwear*”.

B. Non Tariff Barriers

101. Non-Tariff Barriers (NTBs) continues to be one of the most complex areas of NAMA negotiations as attested by the language of legal modalities in the Chair's draft modalities text. After reaffirming the importance of NTBs within the NAMA mandate, the Chairman simply instructs members to move negotiations to discussions of actual texts on individual proposals. Whether or not this instruction will have practical consequence depends on how much the demandeurs of some very controversial proposals will insist on such proposals.

102. In fact, many members resist the mere discussion of certain NTBs (e.g. export taxes) as part of NAMA. Hence, the initiation of text-based discussions in such areas will certainly be unacceptable. In this respect, the Chairman's approach to list all proposals submitted²⁸ could be questioned, as many of these are proposals only engage their proponents and their negotiation has not been assented to.

103. The Chairman reaffirms that the outcome of any NTB negotiations would have to incorporate S&DT in favour of developing countries. However, this is framed as a general obligation, and no guidance is provided as to how such S&DT could be crafted.

C. Environmental Goods

104. Reflecting the lack of agreement on the identification and selection of a list of "environmental goods" by the Committee on Trade and Development, the NAMA draft modalities text simply instructs WTO Members to intensify this area of work so that negotiations on how to treat such goods can be initiated. In fact, negotiations on environmental goods have not even properly started, that is, there have not yet been discussions as to whether these products should be liberalised and by which modalities. Discussions so far have largely concentrated on the prior identification of such products.

VII. CONCLUSION

105. Although the draft NAMA modalities accommodates in its architecture elements of concern of several groups of developing countries, the text proposes a level of ambition that is unacceptable for most developing countries, large and

²⁸ Paragraph 23 of the draft modalities: "horizontal issues such as export taxes, export restrictions and remanufactured goods as well as on vertical initiatives such as electronic products, textiles, clothing, footwear and travel goods, and wood products. Proposed legal texts on a procedure for resolving future NTBs are also under discussion."

small alike. Most delegations have indeed expressed strong concern with the terms of the text. One question delegations have to assess is whether it can, nevertheless, provide a basis for the continuation of discussions in September. This will depend on whether delegations think it is possible to de-link the architecture proposed from the actual numbers. Can these numbers (formula and flexibilities, small and vulnerable economies, countries with low tariff binding coverage) be improved enough to result in a flexible approach to tariff reductions and bindings? By how much do these numbers need to be increased? Is that politically feasible? Or would a flexible approach require a modification of the architecture – and not only the numbers – of the modalities?

106. The modalities proposed reflect what is certainly the most complex and obscure modalities ever negotiated in the history of a GATT/WTO round of negotiations. This is the result of how negotiations have evolved. However, this is not an argument for not questioning the practicality of the text and the ability of all members to schedule necessary concessions, utilise flexibilities, revise each other's draft schedules and monitor the implementation of commitments. The need to ensure the viability of the NAMA modalities would be an additional reason for revising their structure.

107. For instance, from the viewpoint of its viability alone, it is certainly sad that the NAMA draft modalities – unlike the draft for Agriculture – excludes the adoption of a Uruguay Round tariff reduction approach.

108. According to the NAMA “Middle Ground”²⁹ Group, the “losses and missed gains associated with a failure or freezing of the [Doha negotiations] far outweigh the costs of a less than- perfect agreement”. Is this so? Many delegations took comfort in the fact that they had been exempted from applying the Swiss formula under specific flexibilities in the modalities, but the principles that “all must contribute” and the “hierarchy in contributions”, as expressed in the draft modalities, have not resulted in a flexible outcome. The alternative delegations have is not necessarily and should not be between the acceptance of the current draft modalities and a collapse of the round. The choice delegations face should rather be between the current modalities and another text where all delegations, and particularly the most vulnerable WTO members, can find comfort.

109. Given the pressure to conclude the Round and to avoid weakening the already fragile negotiating process, delegations will face enormous pressure to compromise.

²⁹ Chile, Colombia, Costa Rica, Mexico, Peru, Singapore, Thailand, and Hong Kong, China submitted a proposal to the Negotiating Group on Market Access proposing what they called a “middle ground” where consensus could be found around modalities.

ANNEX: RECAPITULATIVE TABLE: COUNTRIES AND MODALITIES IN NAMA

Modality	Description	Commitments	Countries
Developed countries	Self designation	Swiss Formula with a coefficient of 8-9 Implementation: 5 years	Australia, Canada, European Communities, Iceland, Japan, Liechtenstein, New Zealand, Norway, Switzerland, USA
Developing countries subject to the formula (27)	Self designation	Swiss Formula with a coefficient of 19-23 Flexibilities: keep lines unbound (5%), exclude certain lines from the formula or apply less than formula cuts to some tariff lines (10%) Coefficient of 22-26 if flexibilities are not used Implementation: 9 years	Argentina, Bahrain, Brazil, Chile, Colombia, Costa Rica, Egypt, Hong Kong, India, Indonesia, Israel, Korea, Kuwait, Malaysia, Mexico, Morocco, Pakistan, Peru, Philippines, Qatar, Singapore, South Africa, Thailand, Tunisia, Turkey, United Arab Emirates, Venezuela
Developing countries with low binding coverage (12)	Countries who have bound less than 35% of their non-agricultural tariff lines in the WTO		Cameroon, Congo, Côte d'Ivoire, Cuba, Ghana, Kenya, Macao, Mauritius, Nigeria, Sri Lanka, Suriname, Zimbabwe

Small and Vulnerable Economies	Countries whose share of world non-agricultural trade is lower than 0.1% (1999-2001)	with a Bound average higher than 50% + Fiji ³⁰	Bind all tariffs at an average of 22% with a minimum 10% reduction on 95% of lines Implementation: 9 years	Antigua and Barbuda, Barbados, Belize, Dominica, Fiji, Grenada, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent & the Grenadines, Trinidad & Tobago
		between 30% - 49%	Bind all tariffs at an average of 18% with a minimum 10% reduction on 95% of lines Implementation: 9 years	Bolivia, , Dominican Republic, , El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Papua New Guinea, Paraguay, Uruguay
		between 0%-29%	Bind all tariffs at an average of 14% with a minimum 10% reduction on 95% of lines Implementation: 9 years	Botswana, Brunei Darussalam, Gabon, Namibia, Swaziland
	Recently acceded members whose share of world non-agricultural trade is below 0.1%		Benefit from flexibilities as a SVE: Bind all tariffs at an average of 14% with minimum 10% reduction on 95% of lines Implementation: 9 years	Albania, Ecuador, Georgia, Jordan, Mongolia, Panama

³⁰ Fiji benefits of a special arrangement. While the simple average of its bound tariffs would place it in the middle band, the Chairman's modalities text proposes that Fiji be deemed to fall under the first higher band.

Recently Acceded Members	All countries who have joined the WTO since 1995	Apply the Swiss Formula. Flexibilities: start implementing Doha reductions 2 years after the end of their accession obligations. Implementation: 11 years (2 additional years)	Croatia (2005), China (2010), Chinese Taipei (2011), Oman (2009)
		Benefit from a special arrangement and make no tariff reductions beyond their accession obligations	Armenia, Former Yugoslav Republic of Macedonia, Kyrgyz Republic, Moldova, Saudi Arabia and Viet Nam
		Benefit from flexibilities as a SVE: Bind all tariffs at an average of 14% with minimum 10% reduction on 95% of lines Implementation: 9 years	Albania, Ecuador, Georgia, Jordan, Mongolia, Panama
Least Developed Countries	Designated as such by the United Nations	Increase their binding coverage on a voluntary basis. Each country determines the rate at which a new binding should be undertaken. Benefit from Duty-free and quota-free access into developed countries' markets	Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Rep., Chad, Congo DR, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania,

		and into the markets of developing countries' willing to extend such treatment	Mozambique, Myanmar, Nepal , Niger, Rwanda, Senegal, Sierra Leone, Solomon Is, Tanzania, Togo, Uganda, Zambia.
Members in the early stages of development	(?) Not defined in the text	Will benefit from trade capacity-building measures	(?) Not defined in the text. Most likely, WTO Members delivering aid will judge themselves who the beneficiaries of that assistance should be.

READERSHIP SURVEY QUESTIONNAIRE

Comments to the Chairman's Draft NAMA Modalities

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