A New Facilitative Mechanism at the WTO to Address Non-tariff Measures: Issues for Consideration

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Introduction

In 2001 Members of the World Trade Organization (WTO) committed, in the context of non-agricultural market access, to negotiate the reduction of "tariffs [and] non-tariff barriers, in particular on products of export interest to developing countries."[2] The reference to non-tariff barriers (NTBs), referred to in this note as non-tariff measures (NTMs), was included at the insistence of developing countries, who are particularly concerned about those NTMs that are structured to eliminate or reduce imports to benefit domestic industries in developed countries.

Indeed, both developed and developing country exporters face a wide range of obstacles in export markets. NTMs identified in an OECD study in 2003 included, among others: technical measures (including, among other things, content and design requirements, labeling and quarantine requirements); internal taxes or charges; customs rules and procedures; competition-related restrictions on market access; quantitative restrictions; subsidies and related government support; public procurement; and trade defense measures (including anti-dumping and countervailing duties, and safeguards).[3]

In the WTO, negotiations on the elimination or reduction of NTMs began with two notification exercises conducted in the Negotiating Group on Market Access (NGMA), in which Members were given the opportunity to notify those NTMs that hindered their exports in various markets. The NTMs notified in the NGMA similarly covered as wide a spectrum of NTMs as identified in the OECD study, including environmental and health measures.[4]

Identifying and classifying NTMs in the NGMA process were intended to allow Members to develop options for their elimination or reduction. But negotiations have been frustrated, partly because Members, particular developing countries, did not have the resources to identify and analyze individual NTMs that are burdensome for their economy. Currently, the specific NTMs notified reflect primarily the NTMs of concern for developed countries, rather than of developing countries and the least developed countries among them.

The European Communities (EC) and a group of developing countries, the NAMA-11 group,[5] are apparently trying to move away from attempting to address specific types of NTMs that are burdensome in export markets. Instead, each is calling for the creation of a new "facilitative mechanism" in the WTO to address all types of NTMs across-the-board, arguably covering any measure affecting trade that is not a tariff. Both of the proposed problem-solving mechanisms would allow Members to raise their concerns about NTMs in an expedited and informal process. Solutions would be non-binding and without reference to the legality of the NTM in question. At least in theory, the facilitative mechanism would complement existing WTO dispute resolution mechanisms and, therefore, would not interfere with Members' rights and obligations to existing WTO Agreements.

Although the Doha Round of negotiations seems to have been indefinitely suspended as of July 2006, it is likely that the idea to create a new "facilitative mechanism" will continue to be discussed within the WTO – most likely based on the models already proposed.

Situating the "Facilitative Mechanism" within the Current WTO Framework

The introduction of a mechanism along the lines proposed by the EC and NAMA-11 would add a new process to the current WTO framework that could dramatically change the functioning and nature of the WTO. Under the current WTO structure, Members who find that they are adversely impacted by an NTM have three options available. First, Members may raise their concerns through notifications and consultations with the Committees under each WTO Agreement that oversee the implementation of Members obligations. For example, both the Agreement on Technical Barriers to Trade (TBT) and Agreement on Sanitary and Phytosanitary Measures (SPS) require that Members notify the respective Committee of their intention to adopt TBT and SPS measures. The Committees' meetings, the minutes of which are publicly available (albeit with some delay), have served as a platform for discussing a range of NTMs notified, and have influenced Members' decisions and processes.

Under both the TBT and SPS Agreements, Members must notify other Members of new measures when they either deviate from the relevant international standard, or when no such standard exists, and when the measure may have a significant impact on the trade of other countries.[6] Both agreements further require Members to notify the WTO Secretariat of new measures at an early stage to allow time for other Members to make comments.[7] Finally, both agreements oblige Members to set up national enquiry points where Members can request and obtain information and documentation on regulations.[8]

These notification processes have been insufficient to address developing countries' concerns. Following a request by developing country Members,[9] the notification process was complemented under the SPS Agreement by additional requirements to aid developing countries in identifying and complying with measures that will affect their exporting industries. When a Member notifies a new or revised existing SPS measure, developing country Members may request special and differential (S&D) treatment. In response to a request for S&D treatment, the notifying Member must attach an addendum to the notification that indicates: (i) whether special and differential treatment has been requested; (ii) which Members requested special and differential treatment; (iii) whether S&D treatment was provided, and if so, the type of treatment provided; and (iv) if not provided, an explanation why S&D was not provided and whether technical assistance was found to address the identified concerns.[10] This new process increases transparency of notification and S&D implementation. Nonetheless, these provisions fall short of ensuring that Members receive specific information about the types of technical requirements that would be required to comply with the new measures. Moreover, they do not provide Members with a formal process to resolve or influence the adoption of NTMs, in this case SPS measures.

As a result, some Members continue to feel that Committees primarily have the limited role of an "early warning system" where Members can clarify trade policies of other Members, but where there is no adequate mechanism in place for resolving problems relating to NTMs.[11]

Second, above and beyond voicing NTM-related concerns in relevant Committees, Members may bring formal claims under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which provides for the binding resolution of trade disputes. Most NTMs fall either under the scope of existing WTO Agreements, including, for instance, the TBT and the SPS Agreements or the 1994 General Agreement on Tariffs and Trade (GATT). Others fall under the scope of agreements currently under negotiation, such as the negotiations on trade facilitation. It is unclear what types of NTMs fall completely outside the scope of the WTO.

Agreements establish disciplines which direct Members to abide by specific rules when they adopt measures affecting trade, including, among others, that measures be non-discriminatory and that measures be no more trade restrictive than necessary to achieve a legitimate policy objective. This framework arguably allows Members to challenge most NTMs that are adopted without any good reason. However, some Members feel that the dispute settlement process is too expensive and protracted, making it cumbersome and inefficient, particularly for developing countries in need of timely solutions.[12] In addition, some feel a non-adversarial approach would be more fruitful in some instances.

A third option available under the current WTO framework to address concerns with NTMs consists in the good offices, conciliation and mediation mechanisms provided under the DSU. Although linked to formal dispute settlement, they are, in fact, an alternative to the establishment of a panel following the initiation of consultations (the first step in the WTO's dispute settlement process). While participation in consultations is mandatory, participation in good offices, conciliation or mediation is undertaken solely on a voluntary basis by both of the parties. Because Members must initiate consultations before proceeding with one of alternative dispute resolution mechanisms, Members must give "an indication of the legal basis for the complaint."[13]

Under good offices, the Director General provides logistical support to "help the parties negotiate in a productive atmosphere."[14] Conciliation and mediation involve the participation of an impartial third party who contributes to the discussions and negotiations, but under mediation the mediator also proposes non-binding solutions to the parties.[15] To date, the alternative dispute resolution mechanisms available at the WTO have been underutilized. Members proposing to introduce a new mechanism to deal with NTMs feel that the good offices, conciliation and mediation mechanisms provided under the DSU have not shown results.[16]

Presumably in the hope of pleasing their domestic industries, the EC and the NAMA-11 groups of countries have proposed mechanisms that would allow Members to avoid the rules-based system provided in the DSU and the substantive WTO Agreements to deal with NTMs. Instead, the Members would submit themselves to a "facilitative mechanism," which would focus heavily (or exclusively) on the trade impacts of the measure without any reference to the substantive WTO rules and the measure's legality thereunder.

Both the United States and Japan have questioned the need for a new "dispute" mechanism, suggesting existing mechanisms are adequate to address Members' concerns.

An Overview of the Proposed Horizontal NTM Mechanisms

Both proposals create a new horizontal mechanism independent of the DSU to address non-tariff measures without addressing the legality of the measures. Rather, the focus is on the trade restrictiveness of the measure. This stands in contrast to the legal nature of the DSU process, which requires a "brief summary of the legal basis of the complaint"[17] before a panel can be established, and then requires the complaining party to list the covered agreements affected by the measure in question in the terms of reference before the dispute settlement process begins. In this context, it has been recognized that the progressive judicialization of dispute settlement at the WTO, in contrast to the earlier politics of the GATT 1947, both has served to strengthen a rules-based system and to safeguard the rights of smaller Members.[18]

Neither proposal limits the scope of NTMs that can be addressed in the new mechanism. Both lay out a framework for an expedited process that takes no longer than 90 days

(or 60 working days). Both mechanisms provide for facilitation by an impartial facilitator(s) and set out a process that is confidential and secretive. Under both mechanisms Members are encouraged, but not bound, to implement the proposed solutions. Finally, the proposed facilitative mechanisms by the EC and NAMA-11 require mandatory participation of the parties.[19] This is in contrast to the obligations of Members under good offices, conciliation and mediation pursuant to the DSU, where participation is voluntary.

The proposals differ on the level of emphasis placed on ensuring that the needs of developing countries are met. Whereas the EC lists no developing country considerations, the NAMA-11 requires that the process not be "unduly burdensome for developing country Members;" and that the facilitator take the needs of developing country Members into account while making recommendations, including S&D treatment in covered agreements. By comparison, in the consultation phase of the DSU process, which is also designed to operate in 60 days, Members are directed to give special attention to the particular problems and interests of developing country Members, and provisions are in place to extend the time period where developing countries are parties to the dispute. In the panel phase of the DSU process, where a developing country is a party to the dispute, the panel must include one panelist from a developing country when so requested; the panel must "accord sufficient time" for a developing country Member to prepare and present its argumentation.

Overall, the EC proposal creates a process more akin to commercial arbitration, while the NAMA-11 proposal creates a process more akin to mediation. Similar to an arbitral panel or the DSU panel that uses a three to five person panel of trade experts, the EC proposal creates a three- person panel of facilitators. As is common in arbitration agreements, the EC proposal also allows the parties to select a venue of mutual convenience. In contrast, the NAMA-11 proposal provides for a single facilitator and does not address the issue of venue.

A New "Facilitative Mechanism" or Conciliation/Mediation by Another Name?

In many ways, the proposals for a new "facilitative Mechanism" bear a striking resemblance to the mediation mechanism already in place under the DSU process, with two notable differences. First, participation in mediation is voluntary whereas the new mechanism will ostensibly be mandatory; and second, whereas Members must address the underlying legal basis of their concerns in mediation, the new Mechanism will operate without reference to the legality of the measure.

Members will have to consider whether these differences justify the creation of a further bureaucratic layer in the WTO. Creating a mechanism that ensures mandatory participation at first glance appears to be a distinguishing feature that merits the effort of establishing an additional mechanism to address Members' concerns with NTMs. However, the difference between the two in participation requirements is not that clear. First, although mediation in the DSU process is voluntary, Members must begin with consultations, in which participation is mandatory, before resorting to mediation, so that the parties to the dispute will necessarily already be engaged with one another when one party proposes mediation. Second, it is not at all clear that a Member who is forced to participate in the "facilitative mechanism" will be open to constructive discussion, especially given that the proposed solution under both of the proposed mechanisms is non-binding. Thus, even though both parties would be required to participate in the new mechanism, because the solutions are non-binding, Members still would need to resort to the DSU dispute settlement process, as they would under mediation, if a Member chooses not to implement the proposed solution.

In analyzing the effects of an additional mechanism, Members should also consider a scenario in which a Member could be overburdened by "challenges" or requests

for facilitation. It is likely that, because the step to resort to a more informal mechanism would be easier to take than under the formal DSU process, more Members will be brought before the new "facilitative mechanism." Given that facilitation under this mechanism would be mandatory, there is a risk that smaller WTO Members might face a number of parallel requests that are impossible or at least very difficult to deal with given their limited resources.

The second major difference between the proposed NTM mechanisms and meditation under the DSU is that the mechanisms completely move away from the rules based system that the Members have agreed to as the foundation of the WTO. In a mediation process under the DSU the parties address their concerns with regard to the rules the Members have agreed upon. The NTM process under the proposed mechanisms, on the other hand, aims to be completely independent from the current WTO rules.

Moving Away from a Rules-based System: Implications for Sustainable Development

The proposals tabled by the EC and NAMA-11 attempt to address concerns of industry groups that export markets are dwindling due to a proliferation of NTMs. They would like to see these barriers eliminated – the faster the better. The proposed mechanisms refer generally to "non tariff barriers." Consequently, the mechanisms would cover any measure that affects trade and that is not a tariff, and would thus include a wide range of internal measures, many of which fall under the scope of existing agreements or agreements under negotiation. Many NTMs, such as for instance TBT and SPS measures and quantitative restrictions (including import and export bans), pursue important legitimate policy objectives. When considering the adoption of a completely new NTM mechanism, Members should ask whether including such a broad scope of NTMs in a commercial-type of confidential arbitration will defy or promote the goal of the WTO of sustainable development.

In approaching this question, it is important to note that the focus of the inquiry made by the panel or the facilitator would be only on one of the pillars of sustainable development, that is the economic pillar, rather than looking also at the social and environmental pillars. WTO rules, however, explicitly permit Members to pursue social and environmental policies, even where they restrict trade. In particular, the current rules allow Members to take measures to protect human, animal and plant life or health, and the environment. Under the proposed mechanisms, it seems that the panel or the facilitator would not look at the public policy aspect, but rather would focus only on the impacts of the measure on trade. For example, measures such as the EC ban on asbestos or Brazil's ban on retreaded tires would be considered entirely under the angle of trade restrictiveness. It will be important for Members to ask whether the broad coverage of a new facilitative mechanism, along the lines proposed by the EC and NAMA-11, could endanger legitimate regulations and standards, and generally could compromise the use of domestic legislation for environmental and other public interest objectives.

Developing country Members additionally should think about whether a new facilitative mechanism could serve as a back channel for industrialized countries to present issues that developing countries have resisted classifying as NTMs, such as export restrictions and taxes.[20] Holding bilateral discussions on export restrictions and taxes in a confidential forum where developing countries do not have the benefit of institutional safeguards provided under WTO rules could result in further restrictions on the policy options available for developing countries and have deleterious effects on their development agenda, especially given that developing countries are particularly susceptible to bilateral arm-twisting.[21]

Members also should consider how a move away from a rules based system could undermine the predictability and stability provided by the current framework.[22] The proposed new mechanisms, like the previous diplomatic meth-

ods of the GATT, offer a less cumbersome and less expensive process, but could reintroduce the pressures of power politics that the DSU process and a rules based system guard against. By opening discussion to issues independent of the legal basis for the complaint, developing countries lose judicial protection and become vulnerable to the political agenda of developed countries that are in a better position to press their demands and extract concessions relying on carrot and stick bargaining tactics.[23] Unlike traditional diplomatic methods, the new "facilitative mechanism" does require the presence of an impartial third party to facilitate the negotiations. The presence of a third party can serve to deter developed countries from disregarding entirely the needs and concerns of developing countries.[24] However, without the firm commitment of the parties and the linkage of the process to the rules agreed upon by Members in the covered agreements, the proposed mechanism might not be adequate to ensure balanced discussions.

A further point for Members to consider is whether or not a NTM mechanism should be based on transparency and public participation or confidentiality. The two proposals submitted to date stress primarily the element of confidentiality. Complete confidentiality, however, stands in contrast to the current WTO DSU proceedings. While transparency in WTO proceedings has not been institutionalized and proceedings remain to a large extent secretive, submissions and decisions are made public – although with delay. Moreover, panels and the Appellate Body have accepted amicus briefs from non-governmental organizations (NGOs) for their consideration, at least on a discretionary basis. Additionally, there have been efforts to open panel hearings in the DSU to public observation.[25] Under the proposed mechanisms, by contrast, the entire process is intended to be completely secret and decisions and recommendations of the panel of the facilitator will never be made public. While this secretive approach may be adequate to resolve issues between two private entities on purely commercial matters, it seems difficult to defend such an approach in situations where the State is involved and especially in the context of NTMs where public interests are at stake. On the other hand, making recommendations public may lead to influencing a potential formal dispute.

In sum, the proposed horizontal mechanisms would likely have extremely broad application and would cover measures aimed at protecting the environment and human health, and at pursuing other legitimate policy objectives. Adopting a mechanism would amount to a move away from a rules-based system, which, while longer and probably more burdensome, can protect the weaker party from arm-twisting by the stronger Member. Moving away from rules will probably also result in solutions that focus primarily on trade-restrictiveness, without taking into account the public policy objective pursued by the measures. And finally, the proposed mechanism will be confidential and not transparent, moving further away from a more democratic WTO.

Conclusion

Both industrialized and developing countries have voiced their concerns regarding NTMs adopted in export markets. The proposals submitted by the NAMA-11 group of countries and the EC attempt to address these concerns through a "quick fix" solution, by introducing a horizontal mechanism that does not refer to WTO rules, and that focuses on the trade-restrictive effects of specific NTMs. However, in many cases, the issues are complex and multi-faceted. Members must ask themselves whether the characteristics of such a fast-track mechanism are adequate for addressing the extremely wide range of measures covered by the proposed mechanism, especially because the mechanisms would constitute a move away from a rules-based system. This inquiry is particularly important where NTMs are covered that aim at environmental protection and public health. The proposed mechanisms do not appear to consider any aspect or objective other than increased market access through the elimination or reduction of NTMs. Might it be better to limit the scope of application of the proposed mechanisms, either by identifying those NTMs

that can adequately be addressed under this type of mechanism, or by carving out certain types of NTMs from the scope of application, such as for instance, environmental or health NTMs?

Also, because neither of the two proposals is geared to specifically address developing country concerns, there is no indication that the mechanism will effectively address developing countries' concerns regarding NTMs. Developing country Members may want to consider alternative options that are more focused on developing country needs.

For instance, might it be more useful to set up specific processes for Members to address NTMs in a manner similar to the process used in the SPS Committee, which promotes transparency and technical assistance specifically in favor of developing countries?

Finally, developing countries may want to consider whether the move away from a rules-based system may be used to pressure the weaker trading partner into decisions that might inhibit the country's sustainable development goals.

Endnotes

1 This note was written by Nathalie Bernasconi-Osterwalder (nbernasconi@ciel.org) and Margaret Prystowsky, with input from Daniel B. Magraw, Marcos Orellana, and Sofia Plagakis.

2 World Trade Organization, Ministerial Declaration [Doha Declaration], Nov. 14, 2001, WT/MIN(01)/DEC/1; 41 I.L.M. 746 (2002).

3 Organization for Economic Co-operation and Development, "*Overview of Non-Tariff Barriers: Findings From Existing Business Surveys*," (TD/TC/WP(2202)38/FINAL 6 March, 2003), *available at* http://www.olis.oecd.org/olis/2002doc.nsf/43bb6130e5e86e5fc12569fa005d004c/da66d9940afce43fc1256ce1005404d7/$FILE/JT00140440.PDF.

4 For a list of selected NTMs notified *see*, "*Selected notifications of non-tariff barriers which have been listed for negotiation in the Non-Agricultural Market Access WTO talks*," Friends of the Earth International, *available at* http://www foe.co.uk/resource/evidence/NTBs_feb_2006.pdf.

5 The members of NAMA-11 are: Argentina, Bolivarian Republic of Venezuela, Brazil, Egypt, India, Indonesia, Namibia, the Philippines, South Africa, and Tunisia.

6 *See* Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Articles 2.9 and 5.6, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 121 (1999), 1868 U.N.T.S. 120, *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last visited June 27, 2006) [hereinafter TBT Agreement]; *see also* Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex B Paragraph 5, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 59 (1999), 1867 U.N.T.S. 493, *available at* http://www.wto.org./english/tratop_e/sps_e/spsagr_e htm (last visited June. 27, 2006) [hereinafter SPS Agreement].

7 *See* Article 2.9.2, TBT Agreement; *see also* Annex B Paragraph 5, SPS Agreement.

8 *See* Article 10, TBT Agreement; *see also* Annex B, Paragraph 3, SPS Agreement.

9 *See* Statement by Egypt at the Meeting of 7-8 November 2002, "*Comments on the Canadian Proposal*," (G/SPS/GEN/358 15 November 2002).

10 *See* "*Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members,*" (G/SPS/33 2 Nov. 2004).

11 *See* Submission by NAMA-11 Group of Developing Countries, "*Resolution of NTBs through a Facilitative Mechanism*" (TN/MA/W/68/Add.1 8 May 2006); *see also* Communication by the European Communities, "*Concept Paper: Improving WTO Means to Reduce the Risk of Future NTBs and to Facilitate Their Resolution*," *available at*, www.globalinfo nl/filemanager/download/23/060419%20EC%20proposal%20NTB%20disputes.pdf/.

12 *See* TN/MA/W/68/Add.1, (noting that it takes up to two years to reach an enforceable decision). In addition, developing countries that do bring successful claims face problems in enforcing WTO rulings which rely on trade retaliation rather than monetary compensation. The smaller market share of developing countries in world trade makes reliance on trade retaliation infeasible. (AMRITA NARLIKAR, THE WORLD TRADE ORGANIZATION: A SHORT INTRODUCTION, 97 (Oxford University Press, 2005).

13 Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Article 4.4, 1869 U.N.T.S. 401; 33 I.L.M. 1226 (1994).

14 *See* Dispute Settlement System Training Module, 8.1 Mutually agreed solutions, *available at*, http://www.wto.org/English/tratop_e/dispu_e/disp_settlement_cbt_e/c8s1p2_e htm

15 *See Id*.

16 *See* Communication by the European Communities, "*Concept Paper: Improving WTO Means to Reduce the Risk of Future NTBs and to Facilitate Their Resolution*," *available at*, www.globalinfo nl/filemanager/download/23/060419%20EC%20proposal%20NTB%20disputes.pdf/ (suggesting that the lack of use of good offices, conciliation and mediation is likely because this mechanism is seen as too "close" to the dispute settlement process; and thus members are hesitant to engage in these mechanisms for the same reasons they refrain from using the dispute settlement process (ie. expensive and delayed nature of the process).

17 DSU, Article 6.1 and 6.2.

18 See e.g., Marc L. Busch and Eric Reinhardt, Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement, 37 J World Trade 719, 729, 733-34 (2003); John H. Jackson, Dispute Settlement in the WTO:
Policy and Jurisprudential Considerations, Discussion Paper No. 419, Research Seminar in International Economics (1998), available at
http://www.spp.umich.edu/rsie/workingpapers/wp.html; or Asoke Mukerji,
Developing Countries and the WTO: Issues of Implementation, 34 J World Trade 33, 43-44 (2000).

19 The NAMA-11 proposal explicitly states that participation in the process will be mandatory whereas the EC proposal implies the process will be mandatory where it states that the Member to which the request is made "*shall* favourably consider the request and provide a written reply to the notifying Member…" (Communication by the European Communities) (emphasis added).

20 For more information on developed country proposals, see communication from Japan: "*Text-based Contribution for Negotiation on Enhanced Disciplines on Export Restrictive Measures*" (JOB(06)/29, 24 February 2006)(advocating improved transparency based on the existing Agreement on Import Licensing Procedures); communications from EC: "*Activity Report on Export Taxes to the NGMA*" (JOB(05)/321, 8 December 2005)(proposing three options for removing export restrictions, 1) complete elimination of all export taxes, 2) prohibition of export taxes with general exceptions, and 3) binding export taxes at low levels for some specific products of interest to developing countries), and "*Negotiating Proposal on Export Taxes*" (TN/MA/W/11/add. 6, 27 April 2006).

21 Aside from serving as a valuable source of government revenue, export restrictions are used by developing countries to improve their terms of trade, encourage economic diversification, protect and develop infant industries, and serve as countervailing measures against tariff escalations in developed countries. For a more detailed discussion, see South Centre, *Some Reasons Not to Negotiate Export Taxes and Restrictions in the WTO NAMA Negotiations*, SC/AN/TDP/MA 6 (May 2006), *at* http://www.southcentre.org/info/Analysis/ExportTaxesAndRestrictions.pdf.

22 On the predictability and stability of the WTO's rules-based system, *see* for instance, John. H Jackson, *Global Economics and International Economic Law*, JIEL 1, 7 (1998).

23 *See* Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 Harv. Negotiation L. Rev. 331, 347, (Spring 2004) (noting that the neutral adversarial DSU process helps to mitigate the effects of power politics for developing countries because it limits the scope of debate to the legal merits, whereas in bilateral negotiation developing countries are often at a political bargaining disadvantage relative to developed countries because they rely on developed countries for aid and technology transfers, and because bilateral trade makes up a greater percentage of a developing country's gross domestic product (GDP)).

24 *See Id*. at 373 (noting that the presence of a third-party mediator encourages parties to adhere to the rules of the DSU: negotiate in good faith, and give special attention to the particular problems of developing country Members).

25 Two cases filed by EC (*US – Continued Suspension of Obligations in the EC – Hormones Dispute*, and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*) were made open to public observation. *See* NATHALIE BERNASCONI-OSTERWALDER, ET AL., ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE 319 (Earthscan London, 2006).

A New Facilitative Mechanism at the WTO to Address Non-tariff Measures: Issues for Consideration
ANNEX: Comparative Chart[i]

	EC	NAMA 11	Understanding on rules and procedures governing the settlement of disputes (DSU)		
Title of Mechanism	• **Horizontal Mechanism to Facilitate the Resolution of NTBs between WTO Members**	• **NTB Resolution Mechanism**	• **Consultation/ Phase 1 of the Dispute Settlement Process**	• **Good Offices, Conciliation and Mediation (GC&M)**	• **DSU Panel/ Phase 2 of the Dispute Settlement Process**
Purpose	• Facilitate progressive and more rapid resolution of problems arising from NTBs • Clarify the possible trade effects arising from the NTB in question • Assist the parties in reaching mutually agreed solutions without reference to the legality of the NTB	• "Establish a new, standing, flexible and expedient mechanism that is solution based rather than rights based" • Offer creative and pragmatic results that promote trade rather than adversarial outcomes that hinder trade • "Consider primarily the adverse trade impact of the NTB [in question], and not necessarily its legality" • Attempt to resolve problems relating to identified NTBs on a "mediatory or facilitative platform"	• "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." • "A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." • "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." (Article 3.7) • "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." (Article 3.10)		
NTBs targeted	The Mechanism shall apply to non-tariff measures which affect trade between WTO Members and, directly or indirectly, the operation of GATT 1994 or other multilateral agreements on trade in goods	• "NTBs that affect trade in goods and the Agreements listed in Annex 1 of the Marrakesh Agreement Establishing the WTO"	• Disputes arising under any of the agreements listed in Appendix 1 of the Understanding on rules and procedures governing the settlement of disputes. And thus covers any NTB under an agreement.		

	EC	NAMA 11	Understanding on rules and procedures governing the settlement of disputes (DSU)		
Title of Mechanism	• **Horizontal Mechanism to Facilitate the Resolution of NTBs between WTO Members**	• **NTB Resolution Mechanism**	• **Consultation/ Phase 1 of the Dispute Settlement Process**	• **Good Offices, Conciliation and Mediation (GC&M)**	• **DSU Panel/ Phase 2 of the Dispute Settlement Process**
Initiation of Dispute Resolution Procedure	• "Any Member, whose trade is affected by a non-tariff measure of another Member, may request to begin the procedure" by notifying the [relevant WTO body]. The request shall include a brief description of the matter presenting the measure in question and its trade effects.	• "Any Member may submit an issue adversely affecting its trade, and identified by it to be a NTB maintained by another WTO Member, to the relevant WTO body/committee." • Affected Member or Members submit a brief statement of issues describing the problem to the concerned WTO Committee	• Any member may request a consultation pursuant to a covered agreement. (Article 4.3) • "Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint." (Article 4.4)	• GC&M "may be requested at any time by any party to a dispute," and begin when both parties to the dispute voluntarily agree to undertake the procedures. (Article 5.1 & 5.3) • "The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute." (Article 5.6)	• The complaining party may request the establishment of a panel in writing … providing a brief summary of the legal basis of the complaint. (Article 6.1 & 6.2)
Procedure and Time Line	• Request made to [relevant WTO body] • Written response by Member within 10 days of receipt of the notification • Selection of panelist members within 30 days of receipt of request • Party invoking mechanism presents problem to panel within 30 days of appointment of panelists • The other party	• Submission of issue to relevant WTO body/committee • Member to which request is made is then obliged to submit itself to the "NTB Resolution Mechanism" • Selection of facilitator • Affected Member(s) submit a detailed statement of issue describing the NTB and identifying the adverse trade effect	• Request for consultation submitted in writing • "The Member to which the request is made shall… reply to the request within 10 days" of receipt of the request and "enter into consultations… within a period of no more than 30 days after the date of receipt of the request." (Article 4.3) • The requesting	• Request by a Member to begin consultations • Request by either party to the dispute to begin GC&M within 60 days after the date of receipt of a request for consultations. (Article 5.4) • Both parties agree to undertake the procedures • If procedures are terminated, "a complaining party	• Complaining Member requests the establishment of a panel • The panel in consultation with the parties sets precise deadlines for written submissions in keeping with Paragraph 12 of appendix 3, which sets out the proposed time line • Panel Examination, Interim Review, Final Panel Report to

	EC	NAMA 11	Understanding on rules and procedures governing the settlement of disputes (DSU)		
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	provides comments in writing to the expert panel within 15 days of the presentation • "Procedure shall normally take no longer than **90 days** from the appointment of the expert panel" • Expert Panel reports to the [relevant WTO body] about: 1. the process 2. the fact-finding conducted by the expert panel, and 3. the agreed solutions, if any	• Member to which the request is made submits its response along with any defenses • Outcome should be sought within no longer than **60 working days** of the appointment of the facilitator • Facilitator records and forwards the result (either an amicable solution or the failure to reach such a solution) to the relevant WTO body	Member may proceed directly to the establishment of a panel if the Member fails to reply or enter into consultations within the time frame • "If the consultations fail to settle a dispute within **60 days** after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel." (Article 4.7) • A panel may be established during the 60-day period if the consulting parties jointly consider the consultations have failed to settle the dispute (Article 4.7)	may then proceed with a request for the establishment of a panel." (Article 5.3) • But, when GC&M are entered into, "the complaining party must allow a period of 60 days after the date of the receipt of the request for consultations before requesting the establishment of a panel," unless both parties jointly consider that the process has failed to settle the dispute and then a request for the establishment of a panel may be made during the 60-day period. (Article 5.4)	Parties - **6 months** (Article 12.8) • Total time until Report adopted by DSB without appeal = 1 year
Location of Dispute Resolution	• In either of the concerned countries, at the WTO, or another location of mutual convenience	• Not mentioned	• World Trade Organization, Geneva Switzerland		

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Facilitator v. Panel	• Expert panel consisting of three to five industry/subject experts, with one acting as the chair of the panel to serve as a mediator • Parties shall agree on the panelists, but if not, by one party request the Director-General shall appoint the panelists after consulting with the parties	• Mutually agreed upon facilitator selected from a roster maintained by relevant bodies/committees of the WTO • "The roster of relevant experts would be prepared by Members in the concerned committees through consensus [to ensure] adequate representation of experts from developing country Members." • In the absence of agreement on a facilitator, "the Director-General would be empowered to appoint a facilitator from among the roster of experts."	• Consultations are left to the parties to the dispute	• Good offices - DG provides logistical support to help the parties negotiate in a productive atmosphere (8.1 of Dispute Settlement System Training Module) • Conciliation - an impartial third party participates in discussions and negotiations between the parties (8.1 of Dispute Settlement System Training Module) • Mediation - an impartial third party contributes to discussions and negotiations and proposes a solution to the parties. (8.1 of Dispute Settlement System Training Module)	• Panel composition (Article 8.1 - 4) • Panels will be composed of three persons, unless the parties to the dispute agree to a five-member panel (Article 8.5) • If there is no agreement on the panelists, the DG shall appoint the panelists (Article 8.7)
Method of Procedure	• The expert panel will determine the procedure for fact-finding • "The expert panel **may decide** whether to schedule a hearing of the parties, meet with	• The facilitator will choose the preferred method of procedure • "The facilitator **would consult** the involved Members either individually or collectively; the WTO	• Not mentioned	• Not mentioned	• "After consulting the parties to the dispute, the panelists shall… fix the timetable for the panel process." (Article 12.3) • Terms of reference

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	any of the parties individually, seek the assistance of the Secretariat or consult with relevant experts, affected industry and other non-governmental organizations."	Secretariat; affected industries; and other experts, including from industry and other non-governmental organizations."			(Article 7.1 & 7.2) • Panels may "seek information and technical advice from any individual or body … [and] may seek information from any relevant source and may consult experts." (Article 13.1 & 13.2)
Developing Country Considerations	• Not mentioned	• "The procedure adopted will not be unduly burdensome for developing country Members." • "The facilitator will fully take into account the particular problems and interests of the developing country Member . . . while making recommendations." • The facilitator will also consider "the differential and more favorable treatment in the covered agreements while making his recommendations."	• "During consultations Members should give special attention to the particular problems and interests of developing country Members." (Article 4.10). • The parties may agree to extend the time period for consultations where developing countries are parties to the dispute (Article 12.10)	• Not mentioned	• Inclusion of at least one panelist from a developing country Member" (Article 8.10) • Additional time for developing country Member to prepare and present its argumentation (Article 12.10) • S&D considerations (Article 12.11)

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Interim Solutions	• Not mentioned	• Where a Member feels an interim solution is warranted, the facilitator would explore this aspect and encourage the parties to reach an agreement on an appropriate interim solution	• "In cases of urgency… Members shall enter into consultations within a period of no more than 10 days" after receipt of the request, and the complaining party may request the establishment of a panel if consultations fail to settle the dispute within a period of **20 days**. (Article 4.8)	• Not mentioned	• "In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months." (Article 12.8)
Collective Action	• Not mentioned	• Recognizing the several Members may face similar problems in a particular sector, the NTB Resolution Mechanism would allow affected Members to collectively present their problem • The time line for one-to-one facilitation would also apply to group requests	• Not mentioned	• Not mentioned	• "Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints… A single panel should be established to examine such complaints whenever feasible." (Article 9.1)
Third Party Rights	• No third party participation unless the parties mutually agree		• Any Member that considers that is has a substantial trade interest in consultations being held may notify the	• Not mentioned	• "Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB… shall

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			consulting Members and the DSB … of its desire to join the consultations (Article 4.11)		have an opportunity to be heard by the panel and to make written submissions to the panel."(Article 10.2)
Confidentiality	• "All deliberations and information exchanged under the procedures of the Mechanism shall be strictly confidential."	• "Central to the NTB Resolution Mechanism would be the principle that the process can be effectively facilitated only in an atmosphere of confidentiality."	• "Consultations shall be confidential." (Article 4.6)	• "Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential." (Article 5.2)	• "The deliberations of the panel and the documents submitted to it shall be kept confidential… Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential." (Appendix 3.3)
Mandatory Participation	• The Member to which the request is made "*shall* favourably consider the request and provide a written reply to the notifying Member…" (emphasis added)	• Participation in the procedure is mandatory	• Participation is mandatory	• Not Mandatory	• Participation is mandatory
Enforcement	• The implementation of the proposed solutions of the facilitator will not be mandatory • Parties unwilling to implement the recommended solution will be required to state their reasons to the relevant WTO body • Information exchanged or solutions reached during the process would not be used in any WTO dispute settlement procedure		• Not mentioned	• Not mentioned	• Panel report adopted (Article 16.4) • In cases of non-implementation, parties negotiate compensation (Article 22.2); if there is no

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					agreement on compensation, DSB authorizes retaliation pending full implementation (Article 22)
DSU	• The proposed Mechanism is without prejudice to the procedures and obligations governing the DSU, and members remain free to pursue the same matter in parallel or subsequently under the DSU		Consultations/ GC&M are both "without prejudice to the rights of any Member in any further proceedings." (Article 4.6, and Article 5.2 respectively)		• N/A

[i] For the complete texts of the proposals and agreements, *see* Communication by the European Communities, "*Concept Paper: Improving WTO Means to Reduce the Risk of Future NTBs and to Facilitate Their Resolution*," *available at* www.globalinfo.nl/filemanager/download/23/060419%20EC%20proposal%20NTB%20disputes.pdf/; *see also* the submission by NAMA-11 Group of Developing Countries, "*Resolution of NTBS through a Facilitative Mechanism*" (TN/MA/W/68/Add.1 8 May 2006); Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401; 33 I.L.M. 1226 (1994).

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