

Alternative Dispute Resolution Procedure for Agreements on Trade Facilitation

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This paper outlines a facilitative procedure for settlement of disputes in the area of trade facilitation when the party against which a complaint has been lodged in a dispute happens to be a developing country. Such an alternative to the rigid and costly dispute settlement procedure in the WTO may encourage developing country members not to shy away from an otherwise beneficial trade facilitation agreement. [Based on a paper presented at an international conference on trade facilitation held in Livingston, Zambia during November 15-18, 2006. The views expressed here are personal.]

Trade facilitation is the lone Singapore issue that was unbundled from the rest three for continued negotiations in the WTO. Till the recent (one hopes temporary) suspension of the Doha Round discussions, negotiations on trade facilitation centred around the actual elements of a possible new Trade Facilitation Agreement through a process of clarifying and improving the existing GATT Articles V, VIII, and X; and linking its implementation to availability of technical assistance and capacity building. There have been considerable apprehensions regarding the new commitments that developing country members will have to in the area of trade facilitation and, in no small measure, these apprehensions relate to the manner in which disputes arising out of such commitments may be addressed in the future. It has often been emphatically pointed out by developing countries that the existing dispute settlement procedure in the WTO may not be ideally suited for the purpose. Hence, there is a need to look for an alternative procedure.

There have been some discussions in the context of NAMA negotiations on finding alternative dispute resolution procedures to deal with NTBs. There are some common areas between NTBs and trade facilitation measures such as the delay in customs clearance at the border. Here we explore whether the alternative procedures being discussed to address disputes relating to NTBs can also work in the context of commitments in the area of trade facilitation.

One such idea relates to the establishment of a horizontal mechanism, in the form of a procedure for problem-solving in the area of NTBs, with short time-lines, as well as with the involvement of a facilitator that can assist countries in reaching mutually agreed solutions. For details please see Annexure – 1. Another idea relates to a ‘solution-based’ rather than ‘rights-based’ concept that would offer creative and pragmatic results. For details please see Annexure – 2. These ideas cover somewhat similar ground in the sense that they explore alternative procedures for resolving disputes through facilitators.

It would be worthwhile to examine if a similar procedure would be efficacious in resolving disputes that may arise in the area of trade facilitation commitments. One expects that such commitments on the part of individual member countries would be translated into domestic laws and regulations, a breach of which would in the first

instance allow individual traders to approach judicial tribunals within the territory of the member countries to seek redress. Only when individual traders are not able to get necessary relief from such tribunals or too many traders face the same problem, typically arising from defective formulation or defective implementation of law and procedures, it may be necessary to seek a redress through mutually agreed expert facilitators under the alternative dispute resolution mechanism outlined below which will be expeditious and less costly than going through the existing Dispute Settlement Procedure in the WTO.

Brief Outline of Proposed Procedure

General Principles

1. Prompt settlement of situations in which a Member faces an adverse trade impact directly or indirectly as a result of failure to honour TF commitments by another Member, is essential to the effective functioning of the WTO and the promotion of multilateral trade.
2. The resolution mechanism for breach of TF commitments shall be premised on problem-solving within short time-lines, and shall involve a mutually agreed Facilitator whose role shall be to assist Members to reach mutually satisfactory solutions.
3. The mechanism shall adopt a flexible approach based on the principles of good faith, mediation, and conciliatory negotiations, wherein every Member would make a concerted effort to resolve the problem at hand, under the guidance of the Facilitator.

TF Resolution Body

4. The TF Resolution Body (TFRB) is hereby established to administer these rules and procedures. Accordingly, the TFRB shall have the authority to establish and maintain a Roster of Facilitators and adopt the reports made by a Facilitator.

Roster of Facilitators

5. The Council for Trade in Goods may nominate well-qualified experts for acting as Facilitators. Such nominees should have the following qualifications: (i) extensive knowledge of specialised areas of the WTO including customs related issues, (ii) knowledge and experience in alternate dispute resolution mechanisms, including mediation and negotiation; (iii) availability to serve as a Facilitator.
6. Both governmental and non-governmental panellists could serve as Facilitators, provided that they meet the qualification requirements.
7. Citizens of Members whose governments are parties to the dispute shall not serve as a Facilitator with that dispute, unless the parties to the dispute agree otherwise.
8. Expenses relating to the Facilitator, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Request for Facilitator and Terms of Reference

9. One or more Members may make a request in writing to the concerned Member, with a copy of the request to the TFRB, for the appointment of a Facilitator. The applicant

Member/s shall identify the specific issue and provide a brief summary of the complaint sufficient to present the problem clearly.

10. The Member to which the request is made shall in all cases favourably consider the request and shall provide a written reply to the notifying Member/s in no less than ten (10) days after the date of receipt of the notification. The reply shall also be notified to the TFRB.
11. The parties shall agree on an expert Facilitator from the Roster of Facilitators, or any other person, no later than 15 days after the receipt of the request, after which the parties shall inform the TFRB. If no expert facilitator can be agreed within the established time frame, and one of the parties so requests, the Director-General shall appoint the Facilitator from the Roster of Facilitators within 10 days of the request and after consulting the parties.

Functions of Facilitator and Procedure for TF Resolution

12. The role of the Facilitator shall be to actively aid and advise the Members in reaching a solution that is workable and pragmatic, including by helping establish the facts of the matter, bringing clarity to the possible trade effects arising from the issue, and by providing advice and recommendations on possible solutions.
13. The Facilitator shall fully take into account the particular problems and interests of the developing country Member, while making the recommendation.
14. To facilitate the process, the applicant party/ies shall provide in writing, within 10 days of appointment of the Facilitator, a detailed description issue, and its adverse trade effects. This written description shall be submitted to the Facilitator and to the other party. Within 10 days of receipt of this presentation, the other party shall provide its comments in writing to the Facilitator and to the applicant party.
15. The Facilitator may meet individually or jointly with the parties in order to facilitate a mutually agreed solution. With the consensus of the Parties, the Facilitator may also meet other exporters and the affected industry representatives.
16. At any stage of the process, the parties may arrive at a mutually satisfactory solution and the Facilitator shall terminate the process and report the mutually agreed solution in his Report.
17. Pending final resolution of the issue, the Facilitator shall also encourage the parties to apply interim solutions, if any, especially in the case of perishable goods.
18. The overall time limit for finding a solution under this procedure shall not exceed 60 days from the appointment of the Facilitator, unless all parties agree in writing to a longer time frame.
19. Upon termination or at the end of the procedure, the Facilitator shall report to the TFRB about (1) the process, (2) the fact-finding conducted by the expert facilitator and (3) the agreed solutions, including any interim solutions, if any. Any party unwilling to implement the proposed final or interim solutions reached wither with the aid of the Facilitator or through consensus is expected to state its reasons for not doing so within 10 days of receipt of the Facilitator's report.

Miscellaneous

20. Consultations and discussions under the TFRB shall take place at the WTO, or any other place as per mutual convenience.

21. All deliberations and information exchanged under the process shall be strictly confidential. However, the Report made by the Facilitator at the end shall be published.
22. There shall be no third party participation in the process, unless the parties mutually agree.

It is possible to visualise the procedure outlined above, as an additional facilitative procedure to the existing Dispute Settlement Procedure under the WTO when the party complained against is a developed country. On the other hand, when the party complained against is a developing country, it is suggested that the regular Dispute Settlement Procedure may be suspended as a part of Special and Differential Treatment to the developing countries and only the facilitative procedure outlined above may be used for settlement of disputes.

[Annexures below]

Annexure - 1

Parameters for a Problem-Solving Mechanism:
Facilitating the Resolution of Non-Tariff Measures Adversely Affecting Trade
between WTO Members

Annex to Communication from the European Communities
(TN/MA/W/11/Add.8 Dated 1 May 2006)

1. The Mechanism shall apply to non-tariff measures which adversely affect trade between WTO Members and, directly or indirectly, the operation of GATT 1994 or other multilateral agreements on trade in goods, without prejudice to the question whether or not the measures breach existing obligations or otherwise nullify or impair the balance of Members' rights and obligations under WTO Agreements.
2. Any Member, whose trade is adversely affected by a non-tariff measure of another Member, may request to begin the procedure under the Mechanism, as set out below. Such request shall be notified to the relevant WTO body. The request shall include a brief description of the matter sufficient to present clearly the measure in question and its trade effects. The Member to which such request is made shall favourably consider the request and provide a written reply to the notifying Member in no less than 10 days after the date of receipt of the notification. The reply shall also be notified to the relevant WTO body.
3. Upon launch of the procedure under this mechanism, the parties are encouraged to agree on a facilitator, which shall be an expert on the subject matter and act as a mediator.¹ The parties shall agree on the expert facilitator no later than 15 days after the receipt of the request, after which the parties shall inform the relevant WTO body of their choice.² If no expert facilitator can be agreed within the established time frame, and one of the parties so requests, the Director-General shall appoint the expert facilitator within 10 days of the request and after consulting the parties.
4. The purpose of the expert facilitator shall be to assist the parties in bringing clarity to the possible trade effects arising from the NTB in question and reaching a mutually agreed solution, without reference to the legality of the NTB.
5. In the initial stage of the procedure, within 15 days after the appointment of the expert facilitator, the party invoking the mechanism shall present the problem to the expert facilitator, in particular the facts and trade effects relating to the NTB at issue. Within 10 days after this presentation, the other party may provide its comments in writing to the expert facilitator. The expert facilitator may decide the most appropriate way of completing the fact-finding. In particular, the expert facilitator may decide whether to schedule a hearing of the parties, meet with any of the parties individually, seek the assistance of the Secretariat or consult with relevant experts, affected industry and other non-governmental organizations.

¹ For example, in cases concerning standards and technical requirements, the panellists should preferably have a background in relevant international standard setting bodies.

² For example, in order to ease the appointment of a facilitator, relevant WTO bodies can establish rosters of potential facilitators, from which the parties may find the appropriate facilitator of mutual consent.

6. Following this fact-finding, the expert facilitator may provide advisory opinions and propose solutions to the notified matter for the parties' consideration. The expert facilitator may meet individually or jointly with the parties in order to facilitate a mutually agreed solution.
 7. The procedure shall normally take no longer than 60 days from the appointment of the expert facilitator.
 8. Consultations under the mechanism may take place in either concerned countries, in the WTO or in any other third place as per mutual convenience. All deliberations and information exchanged under the procedure of this Mechanism shall be strictly confidential. There shall be no third party participation in the process unless the parties mutually agree.
 9. At the end of the procedure under the Mechanism, the expert facilitator shall report to the relevant WTO body to which the matter was originally notified, about (1) the process, (2) the fact-finding conducted by the expert facilitator and (3) the agreed solutions, if any. Any party unwilling to implement the proposed solutions by the facilitator is expected to state its reasons for not doing so.
 10. The Mechanism is without prejudice to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), including Article 5, and Members' rights and obligations there under. Members may pursue under this mechanism any measure having a trade effect, without prejudice to its rights and obligations under the WTO Agreement. Members may pursue the same matter in parallel or subsequently under the DSU. Information exchanged and solutions explored under this Mechanism shall not be used in any subsequent dispute settlement procedure.
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Resolution of NTBs through a Facilitative Mechanism

Extract from Submission by NAMA 11 Group Of Developing Countries³
(TN/MA/W/68/Add.1 Dated 8 May 2006)

The need therefore is for a new, standing, flexible and expedient mechanism that is solution based rather than rights based; that would offer creative and pragmatic results, which further trade, rather than adversarial outcomes which hinder trade, at least in the short term. Accordingly, a “NTB Resolution Mechanism” is proposed to be established in the WTO as an outcome of this Round. This mechanism will supplement the presently available means to resolve NTBs in the WTO system even after the present Doha Round negotiations conclude. The “NTB Resolution Mechanism” would consider NTBs that affect trade in goods and the Agreements listed in Annex 1 of the Marrakesh Agreement Establishing the World Trade Organization.

The “NTB Resolution Mechanism” would be guided by the principle of “good faith” and conciliatory negotiations wherein every Member would make a concerted effort to resolve the NTB at hand, under the guidance of a mutually agreed “facilitator”. Members would be required to engage with the intention of arriving at a solution to the NTB. It would be informal, low-key and less adversarial than the DSU, and without prejudice to the rights of Members under the DSU. The basic characteristics of such a Mechanism would be:

(a) Finding Pragmatic Solutions to Trade Effects

The fundamental premise for the “NTB Resolution Mechanism” is that there are many NTBs and related issues that can be resolved by trade experts on a case-by-case basis, without going into the legality of the measure. Such a Mechanism will consider primarily the adverse trade impact of such NTB, and not necessarily its legality, and attempt to resolve it on a mediatory or facilitative platform.

(b) Using Expert Facilitators to find the ‘Solution’

Since most NTBs pertain to specialized areas in trade such as SPS, TBT, customs valuation, etc., any resolution of a problem in these technical areas would also require specialized knowledge on part of the “facilitator”. The “facilitator” would thus be an expert in one or more of the concerned fields. For the early appointment of a “facilitator” relevant bodies/committees of the WTO would maintain a roster of relevant experts. The roster would be prepared by Members in the concerned committees through consensus, ensuring adequate representation of experts from developing country Members. Members to the process could select any of the “facilitators” on the roster or any other person, by mutual consent. In the absence of a consensus, the DG would be empowered to appoint a “facilitator” from among the roster of experts.

(c) Submitting an NTB to the Resolution Mechanism

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 for reference to the other party through the “NTB Resolution Mechanism”. The Member to which such a request is made would then be obliged to submit itself to the “NTB Resolution Mechanism”. The role of the “facilitator” would be to actively aid and advise the Members in reaching a solution

³Argentina, Bolivarian Republic of Venezuela, Brazil, Egypt, India, Indonesia, Namibia, Philippines, South Africa and Tunisia.

that is workable and pragmatic, including by helping establish the facts of the matter and by providing advice and recommendations on possible solutions. The “facilitator” will also respect any mutually agreeable solution that is arrived at by the parties themselves.

(d) Sectoral/Plurilateral Elements

In recognition of the fact that several Members may face similar problems in a particular sector in the territory of another Member, the NTB Resolution Mechanism would allow affected Members to collectively present their problem. However, the time lines applicable to a one-to-one facilitation would also apply to group requests.

(e) Establishment of Facts and Trade Effects

The NTB Resolution Mechanism would have clear and short deadlines. An outcome should be sought within no longer than 60 working days of the appointment of the “facilitator”. In order to ensure speedy resolution, the affected Member or Members would submit a brief statement of issues describing the problem to the concerned WTO Committee. Pursuant to the selection of the “facilitator”, the affected Member(s) would submit a detailed statement of issue describing the NTB and identify the adverse trade effect. On receipt of the statement of issues, the same would be transmitted to the Member to which the request is made, who would submit its response along with any defenses. All such submission by Members will be within a fixed time-frame.

(f) Recommendations on the Solution

The “facilitator” would enable the Members to reach an amicable solution for the referred NTB. This would be a pragmatic solution based on the facts presented and with details as to actions required on the part of the concerned Members. The “facilitator” will fully take into account the particular problems and interests of the developing country Member, if any involved, while making the recommendation. The “facilitator” will also take into account the differential and more favourable treatment in the covered agreements while making his recommendations. It is reiterated that the “facilitator” would not be a passive listener; he would be empowered to offer solutions to resolve the issue. Considering that the facilitator would not approach the issue as a ‘dispute’ for the purpose of the DSU, the DSU would not apply to the procedures and recommendations of the “NTB Resolution Mechanism”.

(g) Flexibility of Procedure

The procedure would be flexible and the “facilitator” will be free to choose the preferred method. The “facilitator” would consult the involved Members either individually or collectively; the WTO Secretariat; affected industries; and other experts, including from industry and other non-governmental organizations. The procedure adopted will not be unduly burdensome for developing country Members. The result, either an amicable solution or the failure to reach such a solution, will be recorded and forwarded to the relevant body/committee referring the matter to the “NTB Resolution Mechanism”.

Flexibility would also apply to the solutions sought. For example, where a Member feels that an interim solution is warranted, particularly in the case of perishable goods, the facilitator would explore this aspect as well and encourage the parties to reach an agreement on an appropriate interim solution.

(h) Implementation of Award

While participating in the procedure will be mandatory, implementation of the recommended solution will not be so. This is important as a mandatory implementation requirement will affect the legal rights of the Members concerned. Instead, any party unwilling to implement the recommended solution will be required to state its reasons in the relevant WTO body/committee, to which the original request for launching of the “NTB Resolutions Mechanism” was made.

As in a final result, the implementing Member would have the right not to implement an interim solution. Any decision not to implement the interim solution would have to be communicated with the reason to the “facilitator” and the referring Member.

(i) Right to Approach the DSU

This mechanism will be independent of the WTO’s dispute settlement mechanism. The “NTB Resolution Mechanism” would be without prejudice to the right of the Members concerned to approach the DSU at any stage of the process. Rights of Members under the DSU will be protected. Information exchanged or solutions reached during the process would not be used in any WTO dispute settlement procedure.

(j) Confidentiality

Central to the NTB Resolution Mechanism would be the principle that the process can be effectively facilitated only in an atmosphere of confidentiality. There shall be no third party participation unless both the parties agree to the same. This is expected to lay down the foundation for an open and effective interaction between the parties, and the options for a solution. The result of the process, which essentially lays down whether or not a solution was reached, including any interim solution, would be published and communicated to the relevant body/committee as a report. It is believed that under a confidential mechanism, Members may be more willing to make difficult but necessary concessions to reach a solution.
