

MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

Answers by the co-sponsors to Questions raised during Chair's NTB sessions in 2009
regarding the proposed "Ministerial Decision on procedures
for the facilitation of solutions to non-tariff barriers"¹

Communication from the co-sponsors

Revision

The following communication, dated 29 October 2009, is being circulated at the request of the co-sponsors of the proposed "Ministerial Decision on procedures for the facilitation of solutions to non-tariff barriers".

The co-sponsors of the "Ministerial Decision on procedures for the facilitation of solutions to Non-Tariff Barriers" (African Group, Canada, European Communities, LDC Group, NAMA-11, Group of Developing Countries, New Zealand, Norway, Pakistan and Switzerland) would like to express their gratitude for the questions raised by delegations on the proposal. The co-sponsors provide hereafter the answers given during the various NTB sessions during 2009 in a written form as requested by these delegations. The high number of follow-up questions on answers already provided as much as the overlap of questions by some delegations clearly testify to the maturity of the proposal "Ministerial Decision on procedures for the facilitation of solutions to non-tariff barriers".

I. PURPOSE OF THE HORIZONTAL MECHANISM

The proponents of the "procedures for the facilitation of solutions to non-tariff barriers" (sometimes referred to as "Horizontal Mechanism" or in short HM) are conscious of the fact that non-tariff measures vary significantly in form, effects and objectives, and that non-tariff measures can serve legitimate and important purposes pursued by Members. At the same time, non-tariff measures may also constitute barriers that affect market access opportunities for other WTO Members and potentially impair benefits achieved from the reduction or elimination of tariffs. This was shown by the initial NGMA Non-Tariff Barrier (NTB) inventory which listed a huge variety of issues, despite many of them being already covered by different WTO Agreements. Numerous NTBs are caused by faulty implementation of a law rather than the law itself. The Horizontal Mechanism seeks to provide a means to address such problems quickly and efficiently.

¹ TN/MA/W/103/Rev.3.

1. **The proponents state that “[n]umerous NTBs are caused by faulty implementation of a law rather than the law itself” and that the HM “seeks to provide a means to address such problems quickly and efficiently.” What criteria would the HM proponents apply to differentiate between an NTB caused by “faulty implementation” versus an NTB caused by “the law itself”? If, as the proponents indicate, the HM “is not designed to be a legalistic evaluation of Members’ rights and obligations,” who would decide whether a problem is caused by “faulty implementation” or by “the law itself”, and how would they do so without considering legal issues? (U.S. – follow-up question on the statement above)**

The statement was just an opinion of the proponents expressed to highlight their experience that NTBs often arise due to administrative and implementation reasons. No legal examination of any NTB is intended under the time-bound facilitated problem solving procedures (HM).

2. **In what ways can this horizontal mechanism provide an improved forum to address NTB issues in comparison with existing ones, such as procedures under DSU and bilateral consultations conducted through diplomatic channels or other ways?**
 - **In the event that the measure at issue has already exhausted bilateral consultations before reaching Stage I, it might be difficult to obtain the responding Member’s substantial responses in Stage I and its consent to proceed to Stage II.**
 - **Alternatively, if the measure at issue has not gone through bilateral consultations, it could be better to leave it to voluntary and flexible procedures rather than bringing it into obligatory procedures. (Korea)**

The Horizontal Mechanism (HM) has been proposed as an assisted NTB resolution procedure to be used within the framework of WTO Committees to (i) gain clarity and information about any measure or issue that one or more Members consider to be a non-tariff barrier (NTB); and (ii) to have a facilitated discussion on the issue with the aim of resolving or lessening the adverse trade impact that it may have on other Members’ trade. It is not designed to be a legalistic evaluation of Members’ rights and obligations and therefore is very different from the DSU.

The proposal seeks to strengthen the relevant WTO Committees, by going beyond their present remit of unstructured discussions of specific trade issues without any time frames. In this way it is felt that the returns on the resources that Members already expend on the WTO will improve, thereby enhancing their commitment to the WTO.

It may be noted the HM is not simply a bilateral engagement between two Members. The HM seeks to build upon the strengths that its multilateral character bestows on the WTO.

3. **In the last paragraph of the answer to question 2, the proponents assert that “[t]he HM seeks to build upon the strengths that its multilateral character bestows on the WTO.” Could the proponents clarify what aspects of the HM are multilateral? (U.S. – follow-up question to answer provided)**

In the opinion of the proponents the time-bound facilitated problem solving procedures (HM) will strengthen the WTO and its Committees by enabling resolution of NTBs. Its transparency provisions from the first notification through to the submission of the final factual report ensure that the larger Membership is kept fully informed of the issue at hand and the status of discussions initiated and pending under the HM process. As well, the procedure is designed to build capacity, institutional memory and foster informed discussion in the relevant WTO Committee. In this way, the multilateral system will be strengthened.

- 4. Some Members say that many NTBs remain unsolved not because of the lack of facilitators but because Members weak intention to lift the NTBs. What is the cosponsors' view on this point? Have the cosponsors conducted any analysis on reasons for unsolved NTBs? To what extent do the cosponsors believe the HM would help address NTBs in other vertical proposals we are talking about? (China)**

There are various reasons why non-tariff barriers exist and why they remain unresolved. The experience of the co-sponsors is that if an issue is taken up in a focused and time-bound manner the clarity about the issue and the possibilities of its resolution improve. It is on this understanding that the time-bound facilitated problem solving procedures (HM) have been proposed. It is certainly true that if there is little will to remove or reduce the adverse impact of a measure the possibility of its resolution is already very dim. We have seen this happen not just in WTO Committees but even when binding Appellate Body or Panel decisions are not implemented for political compulsions. In that sense, there can of course be no guarantee that the time-bound facilitated problem solving procedures (HM) with voluntary outcome will be effective in all circumstances. The vertical proposals seek to improve the existing legal regime as applicable to the sectors for which the proposals have been made. These proposals will work well in tandem with the time-bound facilitated problem solving procedures (HM) to comprehensively resolve NTBs.

- 5. In circumstances where there may be little political will to address a measure of concern, how would the Horizontal Mechanism be effective? How would it be more effective than existing ways to address issues, whether within the WTO system or outside? (U.S.)**

In case of little political will to address any issue, the possibility of its resolution may be dim, as can also be the case in formal dispute settlement. In that sense, there can of course be no guarantee that a HM with voluntary outcome will be effective in all circumstances.

The idea behind the HM is primarily to have focused and time-bound discussions amongst affected Members involved in an issue, within the framework of a Committee. Through these discussions, as a second step, if a solution is possible it should be explored with the assistance of a facilitator and implemented in a WTO-compatible way.

These features make the HM valuable as an additional tool not available today and as being less formal, lengthy and complex than formal dispute settlement. Purely informal bilateral trade diplomacy remains in the requesting party's discretion. However, all bilateral relations reflect the power equation between the parties concerned. To overcome this limitation, big and small countries, developed and developing alike, participate in the WTO. For this very reason the proponents, a majority of which are developing and least developed countries, prefer to strengthen the systems in the WTO and seek solutions in the WTO where they have invested significant resources rather than just concentrate on bilateral solutions.

- 6. In the last paragraph of the answer to question 5 in this section, it is stated that developing and least developed countries "prefer to strengthen the systems in the WTO and seek solutions in the WTO where they have invested significant resources rather than just concentrate on bilateral solutions." What systems in the WTO are being strengthened by the HM? How do proponents respond to the concern raised that an important element of the WTO system --- the Committees --- may in fact be weakened by the HM, particularly if the HM can be triggered without an initial discussion of an issue in the relevant Committee? (U.S. – follow-up question to answer provided)**

Given that as a first step, the Chair or Vice Chair of a Committee is proposed to be involved as a facilitator, the Committee's role is strengthened. In addition, the procedure's transparency provisions strengthen the Committee's awareness of the issue at hand and the status of discussions

initiated and pending under the HM process. As well, the procedure is designed to build capacity, institutional memory and foster informed discussion in the relevant WTO Committee.

II. RELATIONSHIP OF THE HORIZONTAL MECHANISM TO THE DSU

The proponents emphasize that the procedures of the Horizontal Mechanism are not intended to replace or otherwise affect the Understanding on Rules and Procedures Governing the Settlement of Disputes, and Members' rights and obligations thereunder.

1. In connection to the procedures under DSU, can this mechanism and DSU procedures take place simultaneously? (Korea)

Technically speaking, yes. However the parties seeking such engagement, i.e. discussions under the HM during the pendency of a dispute under the DSU and on the same matter, should be realistic about the outcome that they may expect. The expectation, therefore, is that parallel procedures would normally not take place.

2. What are the differences between this mechanism and the "good offices, conciliation and mediation" procedures under Article 5 of the DSU? (Korea)

The essential difference is that a procedure under Article 5 of the DSU requires that a formal WTO dispute has already been launched, and it also requires agreement by the responding party. Article 5 is part of the DSU and the whole DSU under its Article 1.1 applies only to disputes brought pursuant to the consultation and dispute settlement procedures of the covered agreements. Therefore, Article 5 cannot apply if a formal request for consultations has not already been submitted under Article 4 of the DSU. It is precisely the intention of the proponents of the HM to allow Members to explore the scope for a solution without having to take the formal step of submitting a request for consultations under the DSU, which is quite a high threshold and also frames the discussion in a legal and adversarial direction. Further, the HM provides a structure which is not available in such detail under Article 5 of the DSU.

3. The proposal provides that all information acquired pursuant to Stage II of the Horizontal Resolution Mechanism ("HRM") shall be "confidential" and "without prejudice to the rights of any party or other WTO Member in any dispute settlement proceeding under the DSU". (para. 16) Does this discipline cover the information acquired pursuant to Stage I of the HRM? Furthermore, is it correct to understand that this discipline guarantees to Members that any information acquired pursuant to the HRM will not be used in future DS case(s) in any manner? How does the mechanism laid out in the proposal make sure it? (Japan)

Stage I of the process is designed to be an information exchange stage. It has two functions: the first is to gain clarity on the issue and the other is for the parties to explore whether they will go ahead into Stage II for assisted problem resolution. Being a transparency stage, paragraph 16 does not apply to this stage of the process.

Paragraph 16 seeks to protect Members rights under a later dispute, if any. It is designed to balance the need for confidentiality (an important element for problem solving) and information on the issue.

Since it is possible that several bits of information exchanged in Stage II are factual and available publicly, there can be no reason for preventing later access to such information in a dispute. The confidentiality provision seeks to protect ideas exchanged; solutions explored; and analysis conducted purely from the perspective of finding a solution to be used prejudicially later. Since this

objective is not very dissimilar to that of the TPRM or, even more relevant, consultations in the DSM, the proponents have used similar language in paragraphs 2 and 16 of the proposal.

- 4. The proposal provides that the facilitator may “offer advice and propose possible solutions”, which “shall not pertain to the WTO consistency of the NTB” at issue. (para. 15) Is it correct to understand that such advice or proposal does not include any kinds of interpretation of the Articles of the WTO Agreements? (Japan)**

The intention of the HM is to focus on the adverse trade impact and try and find a solution to that in a pragmatic manner, without regard to the legality or illegality of the measure. Legal interpretations or discussions of rights and obligations are not seen to be germane to this intent.

It is not excluded that a discussion between the parties on the WTO Agreement takes place from the perspective of coverage of issues; etc. Notwithstanding such discussions on the sidelines, it is correct to understand that that advice or proposals of the facilitator will *not* include any kinds of interpretation of the Articles of the WTO Agreements.

- 5. How could the procedures affect confidentiality and future dispute resolution? (U.S.)**

Given that the ideas and analysis exchanged in the problem solving phase of the process will be confidential, the procedures protect confidentiality notably relative to future dispute settlement procedures. Please refer also to the answer to question 3.

- 6. From the responses to questions II.3 and 5, it appears that information provided during Stage I and even some of the information provided during Stage II would not be confidential. Is this a correct interpretation? For Stage II, who decides what information is confidential? (U.S. – follow-up question to answers provided)**

As per paragraph 16 of the text, all meetings and information (whether provided in oral or written form) during Stage II of the Procedures are confidential. As noted in II.3 above, publicly available information would not be subject to this provision.

- 7. Mutually Agreed Solutions have to be consistent with the WTO Agreements and not diminish rights and obligations of WTO members. Why didn't the proponents reaffirm these objectives and use for example a language similar to article 3.5 of the DSU? How can those objectives be assured?**

In the same line, have proponents considered the possibility that a non-party to the facilitation can be affected with the MAS? What instruments would be available for that party to challenge the MAS? (Chile - para. 19)

Paragraph 19 of the proposed Ministerial Decision stipulates that any mutually agreed solutions must be implemented in conformity with the WTO Agreement. Of course, non-parties who feel affected either in their legal position or other trade interest are free to raise the matter in the available fora. These include the relevant Committee (see paragraph 20), formal dispute settlement, and the HM itself.

III. COVERAGE OF THE HORIZONTAL MECHANISM

The Horizontal Mechanism covers all NTBs affecting trade in goods and falling under the remit of the Council for Trade in Goods except for measures regulated by the Agreement on Agriculture, countervailing measures, antidumping measures, and safeguard measures (Annex 1).

- 1. Regarding the trade related characteristics of NTB measures subject to Stage I, different languages are used in paragraphs 1 and 6: in paragraph 1 “non-tariff barrier ..., which it believes adversely affects its trade” and in paragraph 6, “the measure’s impact on trade.” Do the proponents have any reason for using different terms? (Korea)**

The words “which it believes adversely affects its trade” relate to defining an NTB. In the later reference, the intention is to indicate the actual “impact on trade” of the NTB in question.

- 2. With respect to the scope of application, the Doha Ministerial Declaration (paragraph 16), Annex B of the Framework Agreement, and paragraph 22 of the Hong Kong Ministerial Declaration, all only mention NTBs in relation to non-agricultural products. The scope here seems therefore self-evident. Could the proponents confirm this understanding? (Korea)**
- 3. Are there any other reasons beyond the fact that this negotiating body deals with non-agriculture products to exclude agriculture from the scope of the Horizontal Mechanism (“HM”)? (Chile)**

The suggested coverage of the HM reflects the present structure of the WTO Agreement, as well as the type of measures in question. If the work in WTO is demarcated between agricultural and non-agricultural products as far as market-access negotiations are concerned, the HM could in theory also have been made applicable only to NAMA products. However, given that the WTO Committees are structured on the basis of trade disciplines, rather than product-nature, and even more importantly in view of the nature of the underlying measures in question, such a division does not make sense. The exceptions provided are the measures regulated by the Agreement on Agriculture and specific trade defence measures because these types of measures are not amenable to a solution in the HM. All other issues affecting the trade in goods are proposed to be covered, including SPS matters. NTBs for instance on fish and fish products were notified by several proponents as being of specific interest.

- 4. Would the proponents of the HM view as appropriate Members making requests under the Horizontal Mechanism for the following issues: automotive engine displacement taxes, export taxes and export restrictions, classification issues, private standards, import licenses linked to local production, minimum import prices, customs valuation issues, preferential rules of origin, nuclear materials restrictions, port security measures, level of mercury in fish, different customs treatment of the same product by Customs Union members, administrative delays (U.S.)**

Any non-tariff measure that is within the remit of a covered WTO Committee or under the remit of the Council for Trade in Goods can be raised, i.e. any issue that can be raised and discussed in the WTO Committees or the DSM can be raised in the HM. The proponents do not want to start off with a positive or negative list given the complications of such an approach, which could include an unhelpful legal debate at the beginning of a HM procedure on whether an issue is within the agreed list or otherwise.

However, Members raising politically sensitive issues, such as nuclear materials restrictions or other security related matters, should realistically peg their expectations for a solution. The point is, if these issues can be resolved in the WTO even today, albeit in different time-frames, there is little reason to exclude them from the HM.

5. Have the proponents given further consideration to whether certain issues, such as SPS matters, should be excluded from the scope of the HM? (U.S.)

Following extensive discussions amongst the proponents, the scope as Annex 1 to the present draft text has been agreed to. No changes are envisaged by co-sponsors.

IV. STAGE I OF THE PROCEDURE

Stage I of the problem solving procedure focuses on information exchange through request and response on a specific NTB.

1. Is it correct to understand that “the Members” in this paragraph exclusively means requesting and responding Members, and does not include third parties? (Japan - paragraph 4)

Yes, in Stage I “Members” should be understood as meaning only the requesting and responding Members.

2. Can the proponents explain how the sequencing in their proposal helps to facilitate problem solving? (U.S.)

There is no sequencing suggested by proponents. The proposal seeks to put in place a procedure or a method for problem solving that can be resorted to at any stage by affected Members. It can be resorted to even after a matter has been previously discussed in the relevant Committee or before any such discussion.

Regarding the two stages in the proposal, Stage I is identification of the problem and exploration of whether a solution is possible. Stage II is a facilitated dialogue towards achieving the solution in a WTO compatible way. Recognizing possible implications of stage II on Members rights and obligations, the participation in stage II is not mandatory and can also be terminated even after initiation. The proponents believe that the steps foreseen in the draft Ministerial Decision flow naturally from what is the most useful and effective procedure for the purpose of fostering a mutually acceptable solution.

3. How does this paragraph ensure that requests are made based on evidences? (Japan - paragraph 6)

The requesting Member has to describe the concerns regarding the measures impact on trade i.e., it has to provide a detailed description showing that the issue under consideration is a legitimate trade concern. In the absence of sufficient details, the possibility of a satisfactory resolution will be adversely affected. Transparency through notification to the relevant Committee ensures that the requesting Member provides a sufficient justification for the request.

4. Paragraph 9 envisages a situation which involves one requesting Member and one responding Member; whereas paragraph 6 provides for the possibility of more than one requesting Member in the case of a joint request. How will paragraph 9 operate in the event of a joint request submitted under Stage I? (Singapore – para. 6 and 9)

It is true that paragraph 9 has in mind the standard situation where there are two parties. If there are two requesting Members, then the procedure can operate jointly if the parties can agree on a joint approach – if they cannot, the procedure will have to be split up and proceed (or not proceed)

separately, e.g. in the case where one requesting party wants to proceed to Stage II, but the other does not.

- 5. What information is required to launch a request under the Horizontal Mechanism – for example, the nature of the barrier, the products affected, the trade effects of the measure, the relevant WTO agreement? Would the party launching the request indicate what solution they are seeking or – as is suggested by the language of draft proposal – is the request solely for the purpose of obtaining information about the measure? (U.S.)**

The three elements mentioned, i.e., information on the nature of the barrier; products affected and the trade impact would be crucial for launching the process. Further information exchange will take place through the exchange of the request and reply. It is for this reason it is clearly mentioned that the request “...shall identify and describe the specific measure at issue and provide a detailed description of the requesting Member’s concerns”. The solution will have to be mutually acceptable, but generally it will be to remove or reduce the adverse trade impact.

- 6. Any Member, individually or jointly can put written submission to another party to request information on NTBs and requested country is obliged to provide detailed description on measures that have impact on its trade. Detailed description is too specific and will circumvent Members’ flexibility. How this proposal can be effectively implemented by developing and LDCs due to their limited resources? (Malaysia – paragraph 6)**

The time-bound facilitated problem solving procedures have provisions that take on board the limited resources and related constraints faced by developing countries, particularly the LDCs. These include due restraint to be exercised by Members in raising matters under the Procedures involving an LDC (paragraph 5), flexibility in organization and conduct of deliberations under the Procedures taking into account the possible capacity constraints of developing countries (paragraph 13) and request for technical assistance from the WTO Secretariat (paragraph 22). The requested country (or responding member) is obliged to provide, to the extent practicable, a written response containing comments on the information contained in the request (Para 7). A description of the issue, as detailed as practicable, increases the effectiveness of the procedure and enhances the chances of its resolution.

- 7. What elements of a request should be in a notification which will be circulated among the Members in a relevant Committee? Japan is of the opinion that sensitive elements should be dealt only between the parties involved. (Japan - paragraph 8)**

Stage I of the procedures is for exchange of information. All the information exchanged during this stage for gaining clarity on the issue would be non confidential. Sensitive information is expected to be shared only during the closed meetings under the time-bound facilitated problem solving procedures (HM) in Stage II and these shall be confidential.

At which point does a responding Member have an opportunity to say its opinion on which Committee is the most relevant to deal with the issue in question?

Upon submission of the written response, the responding Member would need to tell the relevant Committee (which has circulated the request) his opinion of the most relevant Committee to deal with the issue in question.

Who bares the cost for a meeting (e.g. meeting place, interpreters, travel expenses) addressed in the last sentence?

The costs would be borne in the same manner as for any other meeting of the WTO Committees. The cost of the facilitator shall be borne as indicated in Annex 2 of the proposal.

- 8. With regard to the threshold for triggering this mechanism, under the current proposal, a member may launch a Stage I obligatory response process with only two simple conditions: the existence of an NTB and its adverse trade effects. Given this low threshold, fishing expeditions on other members' NTBs could take place and impose too much burden on the responding member. Could the proponents consider raising the threshold? (Korea – para. 1 and 6)**

The issue regarding establishing a threshold is the balance that must be struck between the objectives of increasing the participation of smaller countries, particularly LDCs, and preventing fishing expeditions. The interest of these countries typically would be low value or relate to small businesses when compared to that of the bigger players. Members could consider and place thresholds after some experience is gained during the proposed built-in review of the HM. Fishing expeditions could in theory always take place, also in the form of a request for consultations under the DSU where the threshold is similar, and yet it is not a frequent occurrence. It would not make a lot of sense to raise the threshold for using the HM to such a high level that many WTO Members would in many cases be unable to use the HM.

- 9. Also, would a joint request under Stage I not be more likely if the issue in question has been discussed by the Committee first? (Singapore)**

Experience gained in the WTO shows that Members affected by an issue usually coordinate their positions. As such, a discussion in a Committee is a possibility, but is not essential for joint requests.

- 10. With regard to the contents of responding members' responses, this proposal only stipulates that they should include "comments on the information contained in the request."**

It appears that under the current terms, the responding member has a leeway to provide non-substantial and vague statements as a response such as, for example, "the measure at issue and its actual trade impact are different from the information presented by the requesting party." Do the proponents share the above concern? (Korea – para. 7)

Yes, the possibility of non-constructive responses exists, as it always does. Based on experience in the WTO, the proponents however do not think that there are reasons to be overly concerned in this relation. Also, the discussions in Stage II are moderated by the Chair/Vice-Chairs of the relevant WTO Committees. They are expected to ensure that the discussions are in the right direction and outstanding issues, not covered in the written replies, are addressed.

- 11. Which language may be used to provide information as a response? Members should keep in mind that if all relevant information is required to be provided only in WTO languages, requesting Members may not obtain it promptly as translation needs time and resources. (Japan - paragraph 7)**

As for all Committee work at present, the language to provide information as a response will be one of the three official WTO languages. The procedure allows for enough flexibility to take account of reasonable delays due to problems of translation. If there is a willingness to solve the problem, translation of a document will not be the reason for failing to find a solution.

12. **This paragraph states, inter alia, that the parties shall decide whether to proceed to Stage II and that Stage II may only be initiated upon mutual agreement of the parties. However, could the responding Member indicate whether or not it is interested in proceeding to Stage II in its initial response described in paragraph 7? If it does so, would the parties nonetheless be obliged to proceed through the steps described in paragraphs 8 and 9? If so, why, given the additional time and resources that this would entail for both parties? (U.S. - paragraph 9)**

The responding Member could indicate in its initial response in paragraph 7 whether or not it is interested to proceed to Stage II. Depending on the response, it would be up to the requesting Member to determine if it wants to proceed through the steps in paragraphs 8 and 9. Notification by the requesting Member shall certainly further enhance the work of the relevant Committee by highlighting to all Members where difficulties are experienced even when there is no willingness to resolve them.

V. STAGE II OF THE PROCEDURE

Stage II of the procedure focuses on assisted problem solving. This voluntary procedure can be terminated upon request of either party.

1. **We understand and the proponents have repeatedly stated that the HM is a voluntary non-binding instrument. But looking to some of the provisions in the proposal we feel that the parties will have to engage and the voluntary nature could be undermined. One can even see some elements of semi automatism. In that sense, shouldn't the selection process of the facilitator be left entirely to the parties' will so they can select the person who they deem is the most appropriate for the job? (Chile)**

There is no automaticity in the problem solving stage of the Horizontal Mechanism, nor is there an obligation to enter into this stage. Each party can decide whether to engage and even after that when to terminate the problem solving procedure. It is however very important to provide for a fallback procedure in cases where the parties are not able to agree on a facilitator, so that the procedure does not become deadlocked for this reason alone.

2. **Given that these procedures are to facilitate a mutually acceptable solution in an expeditious manner, would it not be useful if some guidance on the terms of the procedures is provided? (Singapore – para. 11)**

The proponents believe that the procedures outlined in paragraphs 6 to 17 of its proposal provide enough guidance striking the balance between standard procedures and flexibility. But if there is a genuine need for additional procedures/guidelines that would assist in a timely resolution of the NTB concern, which is at the heart/spirit of the proposal, the proponents would be open to suggestions from Members.

3. **China would like to invite the cosponsors to elaborate on the role of the third party in this mechanism. China notes that Paragraph 11 of the proposal mentions the participation request from a third party. However, the rights and obligations of the third party remain ambiguous. And this ambiguity would prevent the third party from guarding either its economic interests or systemic concern. (China)**

Given the simplicity of the procedure, it is envisaged that Members with serious and significant concern in an issue would participate directly in the time-bound facilitated problem solving procedures (HM). The concept of Third Party participation in the HM is more directed at granting

transparency to the process and enabling interested Members to offer their views on the issue at hand. To ensure that the basic characteristics of the HM, i.e. timeliness and flexibility are retained, the third party participation in the procedures may be on the terms agreed to by the parties. The co-sponsors are open to further discussion and definition of third party rights and obligations.

4. What rights and obligations do third parties have under the mechanism? (Japan - paragraph 11)

The third parties would participate in the time-bound facilitated problem solving procedures (HM) on terms agreed to by the parties.

5. Regarding third party participation is the date of notification under paragraph 10 or the date of circulation of the notification to the members to be considered as the starting-point for the 10 day time-limit? (Korea – para. 12)

The date of circulation. The question will be kept on record as a drafting suggestion.

6. In the same line, why the tasks of the facilitator or the steps that she or he has to undertake have to be precisely identified? Could that be a constraint for party to accept a facilitation process? Shouldn't the parties, together with the facilitator, decide the appropriate procedure? Certainly if parties cannot agree and despite that they are willing to continue with the process, some guidelines can be provided to the facilitator. (Chile)

If the parties have to negotiate the procedures first and in each individual case, they will lose most of the advantages of the Horizontal Mechanism. Standard procedures are precisely an advantage in such situations where the parties have different underlying interests. This being said, a requesting party that does not like the guidance provided in the HM continues to be able to address the issue in a purely bilateral setting. There is no obligation to invoke the Horizontal Mechanism.

7. Does this paragraph ensure that consultations with relevant experts or stakeholders take place if either the requesting or responding Member so requests? (Japan – para. 15)

As stated in paragraph 13, the facilitator on consultation with the parties shall have full flexibility in organizing and conducting the deliberations under this Procedure.

8. Who bears the cost related to a meeting (e.g. meeting place, interpreters, experts/stakeholders' travel expenses)? (Japan - paragraph 13)

The costs would be borne in the same manner as any other meeting of the WTO Committees. The cost of the facilitator shall be borne as indicated in Annex 2 of the proposal.

9. In addition, and although we see that parties can modify the deadlines, why deadlines were established for example, during the selection process of the facilitator? Couldn't that put pressure on the parties (especially the requested party) and hence go against the voluntary nature of the whole exercise? (Chile)

The overall purpose of the HM is to enhance speedy problem solving. This requires that there are deadlines for each step in the procedure as a default. The procedure strongly relies on the assistance in the problem solving stage and therefore the appointment of the facilitator is a crucial step that should not be left open to delays within the procedure.

- 10. In the event that a Member is refused (by the requesting Member, responding Member, or both) third party participation, will that Member be required to initiate Stage I or could that Member initiate Stage II based on the information provided by the responding Member to the requesting Member under Stage I? (Singapore – para. 12)**

The Member that was refused as a third party will have to start from Stage I since it will not have gone through the information exchange process as a party. Note that the Stage I documents are notified to the Committee.

- 11. Given that the Council for Trade in Goods could be a relevant body to the measure at issue; would it not be better to add “Council” to “any WTO Committee” in the fifth line of the paragraph for the reference of the working procedures? (Korea – para. 13)**

This seems like a reasonable proposal. The question will be kept on record as a drafting suggestion.

VI. FACILITATOR

The Horizontal Mechanism foresees that parties are assisted by a facilitator (Chairperson, Vice Chairpersons, Friend of the Chair).

- 1. Would the elected Chairperson and Vice-Chairperson (together with the assistance of the WTO Secretariat) not be expected possess such technical expertise? (Singapore)**

The Chairperson and Vice-Chairperson will often possess the technical expertise, but not necessarily always.

- 2. With respect to legal issues generally, the HM indicates that the facilitator is not to provide views on legal issues such as the WTO-consistency of an NTB or possible legitimate objectives for maintaining the measure. If a Member feels that a particular measure it maintains is legally permissible and meets its legitimate objectives, what would be the motivation for that Member to change the measure? (U.S.)**

If a Member feels that a particular measure it maintains is legally permissible and meets its legitimate objectives, the Member may or may not want to enter into the time-bound facilitated problem solving procedures (HM). It is not legally bound to enter into such a procedure. The time-bound facilitated problem solving procedures are intended to be a best endeavour effort on the part of the Members concerned.

- 3. Given that the opinion of the facilitator “any such opinion shall not pertain to the WTO consistency of the NTB, the parties' rights and obligations under the WTO Agreement, or to any possible legitimate objectives for the maintenance of the measure”, what technical expertise would be required of the facilitator? (Singapore)**

The technical expertise that would be required of the facilitator would depend on the concerns expressed. Besides technical expertise, the facilitator should also be prepared to explore and spend time to assist the exploration of all avenues to suggest a timely solution to a concern. The minimum requirements are laid down in Annex 2. The facilitator's role is to understand the facts, the measure, and possible alternatives, rather than WTO legal questions.

4. Annex 2 – Given that the funding of AB Members and panelists are based on different criteria, why should the criteria adopted for panelists be applied to non-Chair facilitators? (Singapore)

The co-sponsors believe that the role of the facilitator is closer to that of an ad hoc serving panelist rather than a permanent AB member, hence the proposal. The criteria existing for panelists are ready to be used and suitable.

5. China also has concerns about the qualification of facilitators. It may come out that there would be a surge of initiation of the HM at the beginning of its implementation since many pending NTBs may resort to the HM. In that case, how to ensure the availability of competent facilitators with expertise? (China)

Annex 2 of the time-bound facilitated problem solving procedures (HM) gives the background of the facilitator. As per paragraph 12, the parties by mutual consent or Chairperson of the Council for Trade in Goods after consultation with the parties would select the facilitator in line with Annex 2. This is an automatic check that the facilitator would be well qualified. Geneva is well placed to offer persons with the required qualifications who could be sourced from Member Governments, international organizations, regulatory organizations, trade and industry associations, trade research agencies, etc.

6. Under what circumstances is a non-Chair facilitator requested and can these circumstances be codified in textual form to provide guidance and avoid any unintended ambiguity? (Singapore – para. 12)

As stated in paragraph 12, the preference would be for the Chairperson or the Vice Chairperson to serve as facilitator given their competence. A possible circumstance on which a non-Chair facilitator would be requested by the parties would be if one of the parties or both express doubt on the technical competence of the Chairperson or Vice Chairperson to assist the parties to find a solution to their concern; non-availability of the Chair/Vice Chair due to other engagements; the possibility that the Chair/Vice Chairs are citizens of the parties concerned; reluctance of the Chair/Vice Chairs due to personal reasons, etc. are some of the possible scenarios. However, given that our proposal is a “new” way of trying to resolve an NTB concern, it would be difficult at the early stage of the implementation to have a strict codification of the circumstances in which a non-Chair facilitator would be requested. The review period envisioned in paragraph 24 may provide enough experience to determine if a codification of the circumstances would be useful.

7. Will there be an indicative roster list of non-Chair facilitators which the parties could refer to in the event that the parties prefer to request for a non-Chair facilitator? (Singapore)

Members may consider establishing a roster based on the experience gained at the Review Stage (in para. 24). It may be noted that there are already several Rosters of Experts prepared in the WTO. The efficacy of the present Rosters in providing relevant experts for an issue could also feed into the Review.

- 8. Why the proponents have not included a requirement to consult first with the parties if the facilitator wants to request the assistance of the WTO Secretariat, as is the case for external expertise or stakeholders? What kind of assistance could provide the WTO Secretariat? Would the WTO Secretariat have additional roles throughout the process, for example during the selection process of the facilitator? Who is the WTO Secretariat? The Secretariat of the relevant Committee or a dedicated Division that will be in charge of logistical issues – for example travel arrangements for facilitators – budget, archives as well as substantive support and technical assistance for developing countries? (Chile – para. 15)**

The proponents wish to outline some of the possibilities open for the facilitator to call in. In order to devise possible solutions, the facilitator may need information that is best provided by the WTO Secretariat. The WTO Secretariat has the role of assisting the facilitator if the facilitator so desires. The 'WTO Secretariat' refers to the Division servicing the concerned WTO Committee to which the issue has been notified. No dedicated Division is proposed. All logistical support, including co-ordination with other Divisions of the WTO, will be provided by the concerned Division.

- 9. Also, should the criteria for non-Chair facilitators not be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration (see WT/L/76 – Procedure for decisions having financial implications which may be taken by WTO bodies)? (Singapore)**

The proposed decision is not one for a WTO body to take, but rather a Ministerial Decision. The proponents do not have in mind the adoption of new criteria. Those existing for panelists are there and ready to be used.

VII. FACILITATOR'S FACTUAL REPORT

The facilitator shall issue to the parties, in writing, a draft factual report. After considering the comments of the parties, the facilitator shall submit, in writing, a final factual report to the relevant WTO Committee.

- 1. What is the object and purpose of the report of the facilitator? Being a voluntary mechanism, why should the facilitator only "take into consideration" the comments of the parties to its draft factual report? Wouldn't the parties lose control of the whole (voluntary) process if their comments are not binding to the facilitator? What if the parties have joint agreed comments? Shouldn't the final report reflect or include only those elements that the parties feel are necessary to reach a mutually agreed solution? Nevertheless a balance will have to be found with the need for minimum transparency for the rest of the WTO members. (Chile – para. 18)**

The particular strength of the facilitator in assisting the parties in finding a solution is exactly his independence from their influence. If there is a solution, the facilitator has no interest in not accepting comments by the parties, in particular if they are jointly agreed. The Horizontal Mechanism is not a purely bilateral procedure. In particular, proponents have wished to create the highest possible transparency of the procedure with regard to the relevant Committees whilst balancing the interest of other WTO Members with the interests of the parties to come to a mutually agreed solution.

- 2. What is the legal nature and function of the facilitator's draft factual report? (Korea)**

There is no legal nature to the facilitator's draft factual report. Its purpose is to allow the parties to see the report before it is finalised.

- 3. What is the object and purpose of the facilitator's report if the parties couldn't reach a mutually agreed solution? If the facilitator has to provide such a report, wouldn't there be a risk that she or he could prejudge or give some clues of the reasons for the lack of a mutually agreed solution (especially considering that the facilitator is not bound by the comments of the parties to the draft factual report)? Shouldn't the parties notify to the relevant Committee the end of the process and the lack of a solution? If the role of the facilitator should be limited to help the parties find a solution, why do the proponents think that she or he has to provide notifications to the relevant Committees? (Chile)**

Proponents highly value the work of Committees. In particular in cases where the HM would not deliver the desired speedy solution of a problem, it is likely that the requesting party that still suffers the consequences of not finding a solution might wish to raise the problem in the Committee. It is therefore a reasonable use of resources that the factual report covers the aspects of the issue discussed. Paragraph 18 of the HM is very specific about the information that should be included. The submission of the final factual report does also allow the Committee to build up an overall appreciation of issues existing under its remits, both those resolved and those not resolved. The Committee could focus on the difficult issues with possible systemic implications that could not be addressed by the Horizontal Mechanism.

- 4. The proposal states that the facilitator shall submit its final factual report to the relevant WTO Committee. (para.18). Is it correct to understand that the final factual report does not have any impact on factual finding to be made by the panel in the future DS case(s)? How does the mechanism laid out in the proposal make sure it? (Japan)**

The factual report of the facilitator is designed to simply state the issue; the process followed and the solution agreed to, if any. The internal deliberations during Stage II will remain confidential. Currently, the factual report can possibly be used in DS, as it contains factual information, which the procedure may have revealed and which cannot afterwards be deleted from people's memories. This being said, the factual report does not bind any panel that is tasked to independently establish facts, thus the proponents are ready to reconsider this aspect.

To ensure that the report is factual and to protect member's interests, the parties have been given the right to comment on the report.

- 5. Who is responsible for writing a factual report in case Stage II is terminated or parties reach a mutually agreed solution before the appointment of facilitators? (Japan - paragraph 18)**

If the Stage II is initiated and then terminated, the Facilitator appointed will write the factual report. However, in case there is a MAS even before a facilitator is appointed, i.e. before the Stage II is initiated, *de facto* there will be no need for a Report.

- 6. Given that all information acquired during the proceedings of Stage II shall be confidential, it seems that the facilitator cannot include it in the factual report. Hence, what kind of information can we find in this report other than procedural aspects? (Korea)**

A factual report outlining the problem faced, procedure followed and the solution agreed to, if any. This is deemed by the proponents to be the best way to balance the needs of transparency and confidentiality.

VIII. DISCUSSION IN COMMITTEE AND IMPLEMENTATION OF SOLUTIONS

The Horizontal Mechanism is designed to preserve and indeed strengthen the present WTO structures (e.g. Committees). Its procedures shall be applied in the context of relevant WTO Committees. The relevant WTO Committee is the one overseeing the operation of the WTO agreement most closely related to the measure at issue. If there is no such Committee for a particular measure, the request shall be notified to the Council for Trade in Goods. In view of the importance of Committees, the proponents refer to them no less than 20 times in a total of 25 paragraphs of the Horizontal Mechanism.

1. **Paragraph 8 states that the Member making a request under the HM shall notify its request to the relevant Committee, which would then circulate the request to all Members. What is the role of the Committee at that point? (U.S.)**

Paragraph 8 additionally states that the response to the request would also be notified to the relevant Committee, and then circulated to all Members. What is the role of the Committee at this point? (U.S.)

Co-sponsors would like to reiterate that the proposal on time-bound facilitated problem solving procedures (HM) is meant to strengthen the work of the relevant WTO Committees. It is well known that the functioning of the Committees could be improved to make it responsive to the needs of Members to resolve NTBs in an expeditious manner. The purpose of the notification to the concerned Committee at the two stages mentioned in the question i.e. of a request and response to the HM procedures is to ensure transparency and to keep all the WTO Members fully informed of a process that is underway and may be relevant to the Committee's work. Individual Members may wish to take note and decide upon their interest in the issue under consideration based on the notifications made.

Finally, paragraph 8 states that upon request of either party, both Members must meet with the Chairperson or Vice Chairperson of the relevant Committee. Why is it necessary to require a meeting with the Chairperson at this stage, before the parties have agreed to initiate Stage II? How would this add to existing problem-solving mechanisms, such as the existing ability of a Member to request that a Chairperson use his or her good offices? (U.S.)

Please note that the meeting with the Chairperson or Vice Chairperson is upon request by either party and not a requirement. Co-sponsors believe that if either party request for a meeting with the Chair or Vice Chairperson of a Committee even before the parties have agreed to initiate Stage II procedures, it is with the hope that the problem may be solved without the need to proceed to Stage II procedures. The problem solving procedures are different from the existing ability of a Member to request that a Chairperson use his or her good offices because the present concept of good offices is very much linked to the DSU process which is exactly what the HM proposal would like to avoid.

2. **Paragraph 18 states that the facilitator will submit a final factual report to the relevant Committee. What is the role of the Committee at that point? (U.S.)**

The final factual report is submitted to the Committee for transparency purposes and for information.

- 3. Can the Horizontal Mechanism proponents lead Members through the facilitation procedures in a hypothetical Horizontal Mechanism request – for example, what if an issue was raised that had been in front of Committees extensively in the past. What sort of advice or proposed solution could the facilitator be expected to provide (see HM paragraph 15(a))? (U.S.)**

There are various reasons why an issue can be before a Committee for a longish time-frame without resolution.

A Facilitator can take into account the information sought/ exchanged already and help the concerned Members focus on the solution, if there is one, within the time frame that is offered here in terms of paragraph 15 (a).

- 4. Notifications pursuant to this Decision and the facilitators' final factual reports shall constitute regular items on the agenda of the relevant WTO Committees. The US has submitted a communication (JOB(08)/45) proposing a "Committee First" requirement i.e. for the issue to be placed on the agenda of the Committee and for the Committee to discuss it first. One key consideration is the issue of time-lag between putting the item on the agenda and the Committee discussion. Would additional regularly-scheduled Committee meetings or special meetings not help to address the issue of time-lag? (Singapore – para. 20)**

The proponents believe that the concern they are trying to address in the proposal is not just about time-lags in the Committee meetings but timely and time bound consideration of a concern. Based on the historical workings of the Committees, more meetings do not necessarily lead to the resolution of a concern. Thus, it may be unwarranted to impose more frequent meetings than the Committee's other work justifies or to delay a procedure until the next regular meeting. But the requesting party can always choose to go to the Committee first, and may sometimes or even often have a good reason to do so. This, however, should not be prescribed.

- 5. It seems that "exchange of views amongst Members in the relevant WTO Committee" and Stage I or II can take place simultaneously. If such is the case, one of them could be nominal rather than play a substantial role in resolving issues.**

In connection to this, could the proponents consider the "committee first" proposal by the United States as an alternative in order to address this problem? (Korea - para. 21)

- 6. The US proposal on "Committee First" highlights a series of objectives and benefits such as Institutional Expertise, Multilateral Discussion, Timing and Cross-Cutting Discussions among others. Do proponents consider them relevant and if that is the case, how does the Horizontal Mechanism fulfil those same objectives and provide the same benefits? (Chile)**

Pursuing a matter in multiple forums is not prevented now and it is not proposed to be prevented in the future either. It is for individual Members to decide on the forum where they foresee the best results for their problems and pursue a matter there.

The proponents are providing their views on the U.S. 'Committee-First' proposal separately. The proponents have addressed however in these responses herewith provided specific questions relating to the institutional expertise regarding the facilitator and WTO Secretariat, participation of third parties in the procedure, timing, and notification at the various stages as well as information to the relevant Committees at the end of the problem solving procedure.

- 7. Could the proponents explain what does it mean that the MAS has to be implemented in conformity with the WTO Agreements? Does it mean that the parties have all the recourses and instruments provided for in the WTO Agreement to enforce the MAS, including the DSU? Does it mean that the facilitator has to suggest or explain how the parties have to implement the MAS? (Chile – para. 19)**

No, by no means any of the above. It means that the parties are not entitled to depart from WTO obligations in implementing the MAS.

- 8. In Article 23 of the latest HM text, it states that “...each Committee to which this Decision applies may decide, by consensus, to modify certain procedural aspects of this Decision.” Would the proponents clarify what is meant by “certain procedural aspects”? (U.S.)**

Given that the time-bound facilitated problem solving procedures (HM) would be applicable to a variety of disciplines, the proponents have agreed upon and proposed a simple template that should apply, in their opinion, to all the relevant Committees. However, it is certainly possible that a specific Committee may, considering its past experience, by consensus agree to alter certain aspects of the procedure. Proponents are open to such possibilities. Members may agree to specify or alter aspects, such as the default time lines proposed, possible qualification requirement for facilitators, confidentiality of submissions etc. by consensus.
