

## **WTO NEGOTIATIONS ON TRADE FACILITATION: DEVELOPMENT PERSPECTIVES**

*The following is a report that has drawn upon discussions at two Expert Group Meetings on the Multilateral Trading System organised by the South Centre. This is one section of a larger integrated report on issues that are of concern to developing countries in the preparation of the WTO's 9<sup>th</sup> Ministerial Conference in Bali in December 2013.*

*This report relates to the negotiations on a Trade Facilitation agreement in the WTO, pointing out several development aspects and implications of the proposals on such an agreement.*

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### **I. INTRODUCTION**

An agreement on trade facilitation has been proposed as an outcome from the Bali WTO Ministerial Conference. WTO Members formally agreed to launch negotiations on trade facilitation in 2004 pursuant to the July 2004 Framework Package (referred to as the post-Cancun decision)<sup>1</sup>. The main proponents are the major developed countries, while many developing countries have taken a defensive position. In fact the developed countries have been advocating trade facilitation for many years. It was part of the four 'Singapore Issues', along with investment, government procurement transparency, and competition, which many developing countries had proposed to remove from the Doha negotiating agenda during the 5<sup>th</sup> WTO Ministerial Conference in Cancun. Eventually three of the issues were removed from the agenda through the July 2004 package whilst trade facilitation remained on the table.

The trade facilitation negotiations have been focused on measures and policies intended for the simplification, harmonization and standardization of border procedures. They do not address the priorities for increasing and facilitating trade,

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<sup>1</sup> See: Annex D of the 'Doha Work Programme', Decision Adopted by the General Council on 1 August 2004 ([WT/L/579](#))

particularly exports by developing countries, which would include enhancing infrastructure, building productive and trade capacity, marketing networks, and enhancing inter-regional trade. Nor do they include commitments to strengthen or effectively implement the special and differential treatment (SDT) provisions in the WTO system<sup>2</sup>. The negotiations process and content thus far indicate that such a trade facilitation agreement would lead mainly to facilitation of imports by the countries that upgrade their facilities under the proposed agreement, as an expansion of exports require a different type of facilitation involving improving supply capacity and access to developed countries' markets. Some developing countries, especially those with weaker export capability, have thus expressed concerns that the new obligations, especially if they are legally binding, would result in higher imports without corresponding higher exports, which could have an adverse effect on their trade balance, and which would therefore require other measures or decisions (to be taken in the Bali Ministerial) outside of the trade facilitation issue to improve export opportunities in order to be a counter-balance to this effect.

Another major concern that has been voiced by the developing countries is that the proposed agreement is to be legally binding and subject to the WTO's dispute settlement system, which makes it even more important that the special and differential treatment for developing countries should be clear, strong and adequate enough. The negotiations have been on two components: Section I on the obligations and Section II on special and differentiated treatment (SDT), technical and financial assistance and capacity building for developing countries.

Most developing countries, and more so the poorer ones, have priorities in public spending, especially health care, education and poverty eradication. Improving trade facilitation has to compete with these other priorities and may not rank as high on the national agenda. If funds have to be diverted to meet the new trade facilitation obligations, it should not be at the expense of the other development priorities. Therefore it is important that, if an agreement on trade facilitation were adopted, sufficient financing is provided to developing countries to meet their obligations, so as not to be at the expense of social development.

## **II. NEGOTIATIONS MANDATE AND TEXT**

The negotiation mandate established in the "Modalities for Negotiations on Trade Facilitation" of the 2004 July Package<sup>3</sup> was confined to "clarifying and improving" relevant aspects of trade facilitation articles under the GATT 1994 (i.e. Articles V, VIII and X GATT<sup>4</sup>), with a view to further expediting the movement, release and clearance of goods, including goods in transit. Thus, the negotiations are not meant to limit or eliminate the rights and obligations of Members under the three GATT articles or to impinge on national policy and regulatory space. Yet, several of the

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<sup>2</sup> See the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) and the Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17).

<sup>3</sup> See: Annex D of the "July package" (WT/L/579).

<sup>4</sup> Article V provides for hassle-free movement of transit goods through the territory of other WTO Members. Article VIII seeks to rationalize and simplify border procedures, formalities and charges. Article X requires prompt publication of trade laws and regulations and their uniform, impartial and reasonable administration

proposed provisions, as discussed below, are in fact amending, not just clarifying, the GATT Articles V, VIII, and X. This goes beyond the negotiation mandate and would require, as mentioned below, an amendment of the GATT in accordance with the procedures provided for by the Agreement Establishing the WTO.

The negotiation mandate sets an intrinsic link between Section I and Section II of the draft text referred above, whereby it conditions implementation by developing countries and LDCs on the acquisition of financial and technical capacity, based on the delivery of assistance by developed country Members of WTO (as contained in Paragraphs 2, 3, 6 of Annex D of the “July package” WT/L/579).

### **Major issues in the negotiations and arising from the draft texts**

The following are the main issues of concern for a large number of developing countries in the trade facilitation issue.

**Many developing countries have legitimate concerns that they would have increased net imports, adversely affecting their trade balance.** While the trade facilitation agreement is presented as an initiative that reduces trade costs and boosts trade<sup>5</sup>, benefits have been mainly calculated at the aggregate level. Improvements in clearance of goods at the border will increase the inflow of goods. This increase in imports may benefit users of the imported goods, and increase the export opportunities of those countries that have the export capacity. However, poorer countries that do not have adequate production and export capability may not be able to take advantage of the opportunities afforded by trade facilitation. There is concern that countries that are net importers may experience an increase in their imports, without a corresponding increase in their exports, thus resulting in a worsening of their trade balance. Many of the articles under negotiations (such as the articles on ‘authorized operators’ and ‘expedited shipments’) are biased towards bigger traders that can present a financial guarantee or proof of control over the security of their supply chains. There is also the possibility that lower import costs could adversely affect those producing for the local markets.

**The draft rules being negotiated, mainly drawn up by major developed countries, do not allow for a balanced outcome of a potential trade facilitation agreement.** New rules under Section I are mandatory with very limited flexibilities that could allow for Members’ discretion in implementation. The special and differential treatment under section II has been progressively diluted during the course of the negotiations. Furthermore, while the obligations in Section I are legally binding, including for developing countries, developed countries are not accepting binding rules on their obligation to provide technical and financial assistance and capacity building to developing countries.

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<sup>5</sup> For example, see Wilson, J.S, S. Bagai and C. Fink (2003), “Reducing Trading Costs in a New Era of Security”, Chapter 5 in Global Economic Prospects 2004 – Realizing the Development Promise of the Doha Agenda, The World Bank, Washington, DC; Michael Engman, OECD “The Economic Impact of Trade Facilitation” (OECD Trade Policy Working Paper No. 21 (2005); OECD reports “Trade facilitation indicators; the potential impact of trade facilitation on developing countries’ trade” (OECD Trade Policy Paper no. 144) and the brief “OECD trade facilitation indicators transforming border bottlenecks into global gateways”.

**The trade facilitation agreement would be a binding agreement and subject to WTO dispute settlement.** The negotiating text is based on mandatory language in most provisions, which includes limited and uncertain flexibilities in some parts. Accordingly, if a Member fails to fully implement the agreement it might be subject to a dispute case under the WTO DSU and to trade sanctions for non-compliance. The cost of non-compliance could thus be significant; and to avoid potential trade sanctions, countries may have to invest in infrastructure and incur substantial costs to comply with binding commitments. It is worth noting that several WTO Members have been already challenged under WTO dispute settlement based on the grounds established by articles V, VIII, and X of the GATT 1994<sup>6</sup>.

**Many of the proposed rules under negotiations are over-prescriptive and could intrude on national policy and undermine the regulatory capacities and space of WTO Member States.** The negotiating text in several areas contains undefined and vague legal terminology as well as ‘necessity tests’<sup>7</sup>, beyond what the present GATT articles require. These could establish multiple grounds for challenging a broad range of WTO Members’ laws, rules, regulations and measures not only in matters that pertain to customs, but also on more broadly trade-related matters and on regulations ‘on or in connection with’ import, export and transit of goods (for example, in the proposed article 1 on ‘publication and availability of information’ and article 6 on disciplines on fees and charges’).

**Several provisions would have significant influence on national legislative processes.** For example, some of the articles proposed under the agreement refer to an undefined open-ended category of ‘interested parties’ which have to be included among those which a country has to consult prior to introducing new laws or measures (Article 2 on ‘prior publication and consultation’). The reference to the category ‘interested parties’ is not in the present GATT 1994. It could include an expanded list of entities that have a direct or indirect relation to the trade transactions covered by the agreement, and do not necessarily have to be located in the territory of the Member implementing the measure. This may lead to lobbying and pressures by various interest groups from outside the Member, which could have an undue influence on national regulatory and legislative processes. None of the relevant GATT 1994 articles seem to require any consultation with any party, inside the Member or

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<sup>6</sup> See: Argentina-Textiles and Apparel, US-Certain EC Products, China-Raw Materials, and EEC-Bananas II, EC-Poultry, EC-Selected Customs Matters, Dominican Republic-Import and Sale of Cigarettes, EC-IT Products, Thailand-Cigarettes (Philippines), China-Raw Materials, US- Underwear, Japan- Film, US- Hot-Rolled Steel, US-Shrimp, EC- Bananas III, Argentina- Hides and Leather, US- COOL ([http://www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm#results](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results)).

<sup>7</sup> When a ‘necessity test’ is applied, the WTO DSB consider the following factors (as applied in Antigua US-Gambling dispute case): (1) the importance of the interest and value intended to be protected, (2) the extent the measure contributes to realization of those ends, (3) trade impact of the measure, and (4) if reasonable available WTO consistent alternatives exist. A ‘necessity test’ includes a comparison between the challenged measure and possible alternatives, the results of which are considered in light of the importance of the interests at issue. In this process, the DSB might become involved in questioning the actual interests at hand or the objectives being served by the measure invoked by the state. The appellate body noted that the word ‘necessary’ refers to a range of degrees of necessity, depending on the connection in which it is used (see AB report Korea- Various measures on Beef, para. 161), whereby the appellate body noted: “at one end of this continuum lies ‘necessary’ understood as ‘indispensable’; at the other end is ‘necessary’ taken to mean as ‘making a contribution to’”; See also WTO

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outside, prior to promulgation of laws or administrative regulations. There are only requiring prior publication before enforcement in certain cases<sup>8</sup>. The proposed article would thus introduce a totally new obligation which is intrusive with regard to Member's regulations.

**Several of the provisions under negotiations could hold significant administrative and institutional burdens on LDCs and other developing countries.** Customs and customs-related institutional mechanisms in these countries are not as advanced compared to developed countries. It is worth noting that most of the proposals based on which negotiations are undertaken were presented by developed countries, reflecting the nature and form of practice that they already undertake at the national level. Thus, developing countries are asked to converge to the practice and standards of developed countries. While some developing countries may have the capacity to upgrade their capacity accordingly, many others will have difficulties in aligning the facilities of all their customs agencies and in all regions of the country.

**Meeting the obligations is likely to involve significant costs for developing countries.** The costs include human resource expenses, equipment and information-technology systems, as well as other significant infrastructure expenditures. These costs would not be limited to a one-time investment and most of them are of a recurring nature, and would thus be a burden especially on low-income countries.

For example, Turkey's efforts to modernize its customs information technology required USD28 million.<sup>9</sup> In Morocco, the costs of information and communication technologies (ICT) were estimated at US\$10 million<sup>10</sup>, while in Chile the total investment cost of implementing an automated customs system amounted to USD5 million in the early 1990s.<sup>11</sup> In Jamaica, the introduction of the computerized customs management system cost about USD5.5 million.<sup>12</sup> Tunisia needed \$16.21 million to computerize and simplify procedures.<sup>13</sup>

Furthermore, a 2003 OECD report highlighted that in Bolivia, a five year project for customs modernization cost USD38 million, of which about USD 25 million was spent for institutional improvements and USD9 million for computerized systems.<sup>14</sup> For Chinese Taipei, express clearance alone necessitated establishing 20 new processing lines each equipped with an X-ray scanning machine.<sup>15</sup> There are a total of 117

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<sup>8</sup> This applies to measures of general application 'effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor' (Article X.2 GATT).

<sup>9</sup> World Bank, "Customs Modernization Handbook", Editors Luc de Wulf, Jose B Sokol, 2005, page 296

<sup>10</sup> World Bank, "Customs Modernization Handbook", Editors Luc de Wulf, Jose B Sokol, 2005, page 308

<sup>11</sup> "Quantitative assessment of the benefits of trade facilitation", OECD, 2003, TD/TC/WP(2003)31/FINAL

<sup>12</sup> "Quantitative assessment of the benefits of trade facilitation", OECD, 2003, TD/TC/WP(2003)31/FINAL

<sup>13</sup> Finger and Schuler, "Implementation of Uruguay Round Commitments: The Development Challenge",

[http://policydialogue.org/files/publications/Uruguay\\_Round\\_Finger\\_Schulerpdf.pdf](http://policydialogue.org/files/publications/Uruguay_Round_Finger_Schulerpdf.pdf)

<sup>14</sup> "Quantitative assessment of the benefits of trade facilitation", OECD, 2003, TD/TC/WP(2003)31/FINAL, page

<sup>15</sup> WTO document: TN/TF/W/44

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officers at the express division, working day and night shifts so as to provide a continuous day and night long service.

The infrastructure and automated systems mentioned above are only part of the investments required to allow implementing the practices stipulated under a potential trade facilitation agreement. A World Bank report noted that the costs of implementing ICT at customs is only part of the life cycle cost of these systems and that too often these maintenance and upgrading costs are underestimated and not adequately included in the life cycle costs.<sup>16</sup>

**Accordingly, meeting these costs will necessitate an allocation in the national budgets and could divert limited resources from public services, such as health care, food security and education to customs administration.** This is the reason developing countries are insisting that the additional costs of meeting the new obligations are provided to them, as was the understanding when the trade facilitation negotiation mandate was established. However, there is not yet a binding or adequate commitment for the provision of new and additional funds.

**Most trade facilitation provisions under negotiations are entirely new or go far beyond what the World Customs Organization (WCO) Revised Kyoto Convention (RKC) requires.** The arguments that the proposed trade facilitation agreement would largely be a copy of the RKC, or that it would simply reaffirm what most Member states already agreed to in the RKC, do not hold, as it would contain obligations that go beyond the Convention. Moreover, any obligation undertaken under a new agreement on trade facilitation could be enforced through the dispute settlement body of the WTO and through cross-sectoral retaliation among countries, unlike the Kyoto Convention.

**To be balanced, a trade facilitation agreement requires strong and effective rules under Section II on SDT for developing countries, particularly the LDCs.** These countries need clear and mandatory rules to operationalize the intrinsic link between their obligation to implement and their acquisition of capacity. Procedural rules under the Section II should not be burdensome on these countries in a way that dilute their rights as provided for under Annex D. They should be able to designate themselves the provisions under Section II, and to determine when they have acquired the capacity. Moreover, the agreement should include mandatory rules on obligations by developed country members to provide long-term and specific financial and technical assistance, and capacity building to developing and least developed country Members in accordance with their specific needs for implementing their obligations. A trade facilitation fund should be established to ensure resources for the long term.

**Finally, in order for a trade facilitation agreement to be made legally effective and become part of the WTO body of law, it should be adopted through an amendment to the multilateral trade agreements in Annex 1A of the WTO Agreement.** An agreement along the lines being proposed would alter the rights and obligations of Members under GATT 1994. An amendment of this has to be

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<sup>16</sup> World Bank, “Customs Modernization Handbook”, Editors Luc de Wulf, Jose B Sokol, 2005, page 308

undertaken in accordance with Article X of the WTO Agreement<sup>17</sup>. Accordingly, a potential trade facilitation agreement will take effect only after two-thirds of the WTO membership has ratified it. Moreover, it will only be effective for Members that accepted it. The Members that accept the agreement will also accept applying the ‘most-favoured nation’ rules to their commitments, thus extending accepted preferential treatment to WTO Members having difficulties to accept the agreement<sup>18</sup>.

### III. CONCLUSION

While it may be beneficial for a country to improve its trade facilitation, this should be done in a manner that suits each country, rather than through international rules which require binding obligations subject to the dispute settlement mechanism and possible sanctions when the financial and technical assistance as well as capacity building requirements for implementing new obligations are not adequately addressed.

Thus one possibility is that the agreement provides that substantive provisions in the present Section 1 of the draft text are not legally binding on developing countries, just as the provision of financial resources and technical assistance is non-binding on developed countries. Instead, developing countries can endeavour to meet the obligations on an aspirational basis, and can apply for financial resources for programmes to upgrade their trade facilitation capacities.

In the case commitments under a multilateral trade facilitation agreement are undertaken, these should be approached in a way that would **provide developing Members and LDCs with policy space and flexibility to adopt and implement commitments commensurate with their capacity to do so, and subject to the provision of technical and financial assistance and capacity building**. Developing Members and LDCs could then, at their discretion, progressively move into higher levels or standards of implementation, when capacity exists to do so, taking into account their development context.

Achieving the above necessitates a balanced agreement with effective and binding rules on SDT that fully operationalize Annex D (2004). Moreover, least developed countries should be exempted from undertaking binding commitments as long as they remain LDCs. This would be consistent with the understanding in other components of the Doha work programme, where the draft modalities for agriculture and NAMA stipulate that LDCs are not required to reduce their bound tariffs<sup>19</sup>.

On the basis of the current content of the negotiating text and given the current internal imbalance in the proposed agreement, developing countries are advised to be very

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<sup>17</sup> Articles X.1 and X.3 of the WTO Agreement would apply in this case

<sup>18</sup> See ACWL paper (2006) “Giving Legal Effect to the Results of the Doha Development Round: An Analysis of the Methods of Changing WTO Law”, available at <http://www.acwl.ch/e/documents/ACWL%20Paper%20Giving%20Legal%20Effect%20to%20the%20Results%20o>

[f%20the%20Doha%20Round.pdf](http://www.acwl.ch/e/documents/ACWL%20Paper%20Giving%20Legal%20Effect%20to%20the%20Results%20of%20the%20Doha%20Round.pdf).

<sup>19</sup> See for example para. 14 of 4th revision of draft modalities for NAMA, December 2008, TN/MA/W/103/Rev.3

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cautious about rushing into a trade facilitation agreement by the ministerial conference in Bali, given the implementation challenges it carries. Furthermore, this decision should be considered in light of what developing countries and LDCs are able to obtain in other areas of interest to them.

A large part of the Doha work programme (the Doha Development Agenda) that would benefit developing countries and help to set right the imbalances of the Marrakesh Treaty remain to be completed. Developing countries and LDCs are advised to ensure that the entry into force of a trade facilitation agreement, if finally adopted, is linked to the conclusion of the Doha mandate with its development dimension fulfilled and based on the single undertaking.

As noted, some of the proposed obligations under a trade facilitation agreement would change current GATT 1994 provisions. Therefore, a formal process of amendment under article X of the Agreement Establishing the WTO would be required.

In case an agreement is accepted on a 'provisional basis', in the context of paragraph 47 of the Doha mandate, then WTO Members are advised to define what they mean by 'provisional'. The enforceability of the new agreement should be conditional upon the conclusion of the Doha Round as a single undertaking and the approval of the new agreement in accordance with the WTO rules. Hence, the DSU should not apply to the agreement when implemented on a 'provisional' basis. Within the period of provisional application, Members should be able to voluntarily choose to apply all or parts of the agreement. This may help avoid a scenario in which the developed countries would already have attained a definitive agreement on trade facilitation and then have no more interest in negotiating or completing other issues in the single undertaking of the Doha round.

If a balanced text is not attained by the ministerial conference in Bali, negotiations on trade facilitation can continue post-Bali with a view towards attaining an agreement that is internally balanced, as well as within a balanced overall Doha outcome. Political arguments about the damage that could be made to the WTO as a global rule-making institution in case of failure to get an agreement on this subject should not be given precedence over the genuine interests of developing countries. Indeed, the greatest failure of the WTO will be to make decisions that do not 'ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'<sup>20</sup>.

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<sup>20</sup> Preamble of the Agreement Establishing the WTO, para. 2.